

08:57AM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CISCO SYSTEMS, INC.,) CV-14-5344-BLF
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) SEPTEMBER 9, 2016
)
) PAGES 1-107
ARISTA NETWORKS, INC.,)
)
DEFENDANT.)
)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: SEAN SANG-CHUL PAK
JOHN NEUKOM
QUINN EMANUEL URQUHART & SULLIVAN, LLP
50 CALIFORNIA, FLOOR 22
SAN FRANCISCO, CA 94111

FOR THE PLAINTIFF: DAVID A. NELSON
QUINN EMANUEL URQUHART & SULLIVAN, LLP
500 WEST MADISON STREET, SUITE 2450
CHICAGO, IL 60661

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1 FOR THE PLAINTIFF: JORDAN ROSS JAFFE
2 QUINN EMANUEL URQUHART & SULLIVAN, LLP
3 555 TWIN DOLPHIN DR, 5TH FL
4 REDWOOD SHORES, CA 94065

5 FOR THE DEFENDANT: ROBERT ADDY VAN NEST
6 RYAN WONG
7 DAVID SILBERT
8 BRIAN FERRALL
9 KEKER & VAN NEST LLP
10 633 BATTERY STREET
11 SAN FRANCISCO, CA 94111-1809
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SAN JOSE, CALIFORNIA

SEPTEMBER 9, 2016

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS
WERE HELD:)

THE COURT: ALL RIGHT. HELLO.

AND I GUESS WE HAVE A LITTLE BIT OF A BIG TASK AHEAD OF US
TODAY. AND I'VE DONE A LOT OF READING AND YOU ALL DID A LOT OF
WRITING, SO I REALLY APPRECIATE THAT.

I SENT OUT AN ORDER LIMITING YOUR TIME, AND I KNOW I
LIMITED IT TREMENDOUSLY, SO IF WE GO OVER A LITTLE BIT, I'M NOT
GOING TO BE CUTTING YOU OFF LIKE I DO AT TRIAL. I JUST FELT
THAT AT THE LAST HEARING I DIDN'T SET ANY PARAMETERS AND IT
JUST GOT -- I DIDN'T CONTROL IT AND I SHOULD HAVE.

SO THANK YOU FOR -- I KNOW YOU'VE GEARED YOUR PRESENTATIONS
TO COMPLY WITH THAT TIME. AND AS I SAY, IF MY QUESTIONS SLOW
US DOWN A LITTLE BIT THEN THAT WILL BE FINE AS WELL, I JUST
WOULD LIKE TO WRAP THIS UP THIS MORNING AND THEN HAVE OUR
CONFERENCE, WHICH IS ACTUALLY MORE IMPORTANT TO ME TODAY, I
THINK, EVEN THAN THIS, BECAUSE YOUR BRIEFING HAS BEEN SO GOOD.

BEFORE WE GET STARTED, I WANTED TO MAKE A FEW COMMENTS ON
THE EXPERTS AND THE OPINIONS THAT I WAS MOST FOCUSED ON. AND I
FOCUS ON THEM IF I MIGHT EXCLUDE, IF I'M GOING TO ALLOW IT IN,
I ACTUALLY DON'T NEED TO MAKE COMMENTS.

SO I HAVE MADE NO DECISIONS ON THIS FROM YOUR PAPERS, BUT
IT MAY HELP YOU BECAUSE YOUR TIME IS LIMITED.

09:03AM 1 WITH THE EXPERTS, I THINK IT'S DR. BLACK, AND MR. SEIFERT
09:04AM 2 ON THE DE FACTO INDUSTRY STANDARD ISSUE, I HAVE REAL CONCERN
09:04AM 3 ABOUT HOW FUZZY THE STANDARD IS AND WHETHER THERE'S SOME LINE
09:04AM 4 THAT IS REASONABLE TO MARKET FROM BEING FULLY PROTECTED AND
09:04AM 5 ORIGINAL AND PROPRIETARY WITH THE COMPANY, AND IT'S ALWAYS
09:04AM 6 PROPRIETARY UNDER THE COPYRIGHT, BUT BECOMING A DE FACTO
09:04AM 7 STANDARD, I'M VERY CONCERNED ABOUT THAT SUBJECTIVE STANDARD.

09:04AM 8 WITH MR. SEIFERT, HIS MARKET EFFECT OPINION DOES NOT SEEM
09:04AM 9 TO BE BOUND IN ANY KIND OF MARKET SURVEY, AND I'M CONCERNED
09:04AM 10 ABOUT THE LIMITATION ON WHAT HE'S DONE TO LAY A FOUNDATION.

09:04AM 11 ON DR. ALMEROTH, ON HIS SOURCE CODE COPYING OPINIONS, I
09:04AM 12 TRIED TO READ HIS COPYING EXHIBITS, THEY WERE A LITTLE BIT
09:05AM 13 BEYOND ME, SO YOU MIGHT BE FOCUSSED ON THAT ANYWAY, BUT IT
09:05AM 14 DOESN'T APPEAR -- WELL, LET ME BACK UP, THE WAY THAT ARISTA
09:05AM 15 COUCHED THE MOTION WAS ABOUT SOURCE CODE COPYING AND THE
09:05AM 16 OPPOSITION TALKS ABOUT OPINIONS REGARDING SIMILARITIES.

09:05AM 17 SO I DON'T KNOW WHETHER YOU ARE TALKING PAST EACH OTHER OR
09:05AM 18 ACTUALLY HIS OPINIONS ARE ONLY ABOUT SIMILARITIES. AND IF
09:05AM 19 THAT'S THE CASE, I'M NOT SURE HOW OR WHY THEY WOULD COME IN.

09:05AM 20 AND THEN WITH THE ELSTEN, CHEVALIER DAMAGES OPINIONS, WE DO
09:05AM 21 NEED TO TALK ABOUT THE PROPER LEGAL TEST ON CAUSAL NEXUS. BUT
09:05AM 22 I THINK MY BOTTOM LINE QUESTION THERE, THE ISSUE IS
09:05AM 23 DISGORGEMENT OF PROFITS, AND IT'S IN THE PAPERS, AND MY
09:05AM 24 EXPERIENCE IS THAT'S ONLY AN EQUITABLE CONSIDERATION FOR THE
09:05AM 25 COURT AND NOT THE JURY.

09:05AM 1 AND IF THAT'S IN FACT THE CASE, I'M NOT ACTUALLY SURE HOW
09:06AM 2 MUCH OF THIS I NEED TO FOCUS ON AT THIS POINT, AND IT MAY BE
09:06AM 3 THAT WHOLE DISCUSSION CAN BE DEFERRED UNTIL A POST-VERDICT
09:06AM 4 FINDING THAT WOULD BRING THIS DAMAGES ISSUE TO THE COURT.

09:06AM 5 IF IT ACTUALLY HAS A JURY ASPECT, PLEASE CORRECT ME, BUT IT
09:06AM 6 DIDN'T APPEAR THAT IT WOULD BASED ON THE WAY IT'S SET UP. BUT
09:06AM 7 THOSE ARE, AS I SAY, THOSE ARE ONLY A FEW THINGS. YOU HAVE
09:06AM 8 RAISED DOZENS MORE ISSUES AND THOSE WERE THE KEY THINGS THAT I
09:06AM 9 WAS CONSIDERING POTENTIAL EXCLUSION ON OR HAD REALLY NEEDED
09:06AM 10 MORE CLARITY.

09:06AM 11 SO WITH THAT I'M GOING TO STOP WITH MY COMMENTS SO THAT WE
09:06AM 12 CAN ACTUALLY GET TO YOUR PRESENTATIONS. AND I DON'T KNOW HOW
09:06AM 13 YOU HAVE EACH PLANNED TO MAKE YOUR PRESENTATION. IF YOU WANT
09:06AM 14 TO PRESENT ON YOUR OWN MOTIONS AND THEN WAIT AND RESERVE SOME
09:06AM 15 TIME TO OPPOSE THE ONES AGAINST YOUR OWN EXPERTS --

09:06AM 16 MR. PAK: YOUR HONOR, WE MET AND CONFERRED. WE
09:07AM 17 THOUGHT WE WOULD PING PONG BACK AND FORTH, SO WE WOULD PICK ONE
09:07AM 18 AND THEY WOULD REBUT, AND THEY WOULD PICK ONE.

09:07AM 19 THE COURT: OH, THAT WOULD BE MUCH MORE HELPFUL TO
09:07AM 20 ME. OKAY. THAT WORKS REALLY WELL. AND I BELIEVE CISCO HAD
09:07AM 21 THE BULK OF THE MOTIONS, SO WERE YOU GOING TO START, MR. PAK?

09:07AM 22 MR. PAK: YES. SO I'M GOING TO ACTUALLY INTRODUCE MY
09:07AM 23 PARTNER DAVID NELSON FOR THE PARTIES.

09:07AM 24 THE COURT: OKAY. I HAVE ALL KINDS OF NOTES AND
09:07AM 25 PAPERS HERE. AND YOU HAVE GIVEN ME SOME SLIDES WHICH I ALWAYS

09:07AM 1 APPRECIATE. THANK YOU. IT WILL REALLY HELP FOCUS ME ON THE
09:07AM 2 EVIDENCE YOU FIND MOST IMPORTANT.

09:07AM 3 MR. NELSON: THANK YOU, YOUR HONOR.

09:07AM 4 DAVE NELSON, TO INTRODUCE MYSELF ON BEHALF OF CISCO HERE,
09:07AM 5 IT'S A PLEASURE TO MEET YOU.

09:07AM 6 THE COURT: THANK YOU. GOOD TO SEE YOU.

09:07AM 7 MR. NELSON: THANK YOU. I DON'T HEAR THAT ALL THE
09:07AM 8 TIME, SO THANK YOU.

09:07AM 9 SO LET'S TALK ABOUT DR. BLACK, AND I WANT TO FOCUS IN ON
09:08AM 10 EXACTLY WHAT YOUR HONOR JUST SUGGESTED. SO WE HAVE THIS
09:08AM 11 TESTIMONY ABOUT DE FACTO INDUSTRY STANDARDS OR QUASI INDUSTRY
09:08AM 12 STANDARDS, THEY ARE STATED DIFFERENT WAYS.

09:08AM 13 SO JUST TO BE CLEAR, INITIALLY WE ARE -- CERTAINLY NO ONE
09:08AM 14 IS TALKING ABOUT TRUE INDUSTRY STANDARDS HERE WHICH IS THE KIND
09:08AM 15 OF THING WE HEAR ALL THE TIME WHERE THERE'S STANDARDS BODIES
09:08AM 16 THAT GET TOGETHER AND THEY FORMULATE BASICALLY TECHNICAL
09:08AM 17 SPECIFICATIONS SO DEVICES CAN WORK TOGETHER.

09:08AM 18 WE HEAR THAT IN THE CELL PHONE MARKET AND WITH BASE
09:08AM 19 STATIONS AND THINGS LIKE THAT ALL THE TIME. SO THAT'S NOT WHAT
09:08AM 20 WE ARE TALKING ABOUT HERE, AND THAT'S PART OF THE PROBLEM.

09:08AM 21 BECAUSE THE TEST THAT'S BEEN FORMULATED REALLY IS NO TEST
09:08AM 22 AT ALL, AND WHEN WE SEE HOW DR. BLACK APPLIED THAT TO HIS OWN
09:08AM 23 ANALYSIS, I THINK THAT'S REALLY ILLUSTRATED.

09:08AM 24 SO BEST I CAN SEE, AND IT COMES ACROSS A FEW PLACES IN HIS
09:08AM 25 REPORT, THE WAY DR. BLACK DEFINES INDUSTRY STANDARD IS, AND I

09:09AM 1 THINK HE, IT'S IN PARAGRAPH ONE 71 OF HIS REPORT FOR ONE PLACE,
09:09AM 2 BUT IT SAYS INDUSTRY STANDARD CLI, REFERS TO THE COMMON WELL
09:09AM 3 KNOWN AND WIDELY ADOPTED FEATURES AND FUNCTIONALITY OF CLI
09:09AM 4 SUPPORTED ACROSS MULTIPLE VENDORS'S NETWORKING DEVICES WITH
09:09AM 5 WHICH END USERS HAVE BECOME AND ARE FAMILIAR.

09:09AM 6 OKAY. WELL, RIGHT THERE WE ARE TALKING ABOUT SOMETHING
09:09AM 7 PRETTY FUZZY, RIGHT. IT'S VERY SUBJECTIVE, THERE'S NO REAL
09:09AM 8 OBJECTIVE CRITERIA. AND IF WE LOOK AT WHAT DR. BLACK DID, AND
09:09AM 9 WITHOUT GOING THROUGH ALL OF THESE SLIDES, THERE'S A COUPLE
09:09AM 10 THINGS THAT I REALLY WANT TO FOCUS ON.

09:09AM 11 HERE, YOUR HONOR, THIS WHOLE DEPOSITION, SOME OF THIS IS
09:09AM 12 DEPOSITION TESTIMONY HAS BEEN MARKED ATTORNEY'S EYES ONLY. SO
09:10AM 13 I DON'T KNOW -- I GUESS MAYBE TAKE IT OFF THE SCREENS AND MAKE
09:10AM 14 SURE IT'S ON YOUR SCREEN, AND I WILL TRY NOT TO --

09:10AM 15 THE COURT: YES. AND CERTAINLY IN A HEARING LIKE
09:10AM 16 THIS, I'M GLAD TO CLOSE OR EXCUSE PEOPLE FROM THE COURTROOM. I
09:10AM 17 ASSUME THESE ARE CORPORATE REPRESENTATIVES WHO ARE HERE. AND
09:10AM 18 IT'S UP TO YOU, MR. NELSON WHO STAYS AND WHO GOES.

09:10AM 19 MR. NELSON: YEAH. AND I THINK I WOULD DEFER, YOU
09:10AM 20 CAN SEE FROM THE SLIDES WHAT THAT TESTIMONY IS, RELATIVELY HIGH
09:10AM 21 LEVEL STUFF, AND IT'S FROM THEIR WITNESS.

09:10AM 22 THE COURT: THE SCREENS ARE OFF THAT THE AUDIENCE
09:10AM 23 COULD SEE. MY SCREEN IS ON AND I HAVE THE SLIDE DECK. IS
09:10AM 24 THERE ANY OBJECTION TO THE INDIVIDUALS IN THE COURTROOM
09:10AM 25 REMAINING?

09:10AM 1 MR. FERRALL: NO, YOUR HONOR.

09:10AM 2 THE COURT: OKAY. THEN LET'S PROCEED.

09:10AM 3 MR. NELSON: ALL RIGHT. THANK YOU, YOUR HONOR.

09:10AM 4 SO WITH THAT DEFINITION THAT I JUST READ, WHAT DR. BLACK
09:11AM 5 DOES INITIALLY IS LOOK AT SOME OF THE ASPECTS OF THE WORK, THE
09:11AM 6 CISCO CLI THAT CISCO, AND I'M SURE THAT THAT WILL COME UP LATER
09:11AM 7 AND WE CAN TALK ABOUT THAT IN MORE DETAIL, YOUR HONOR, BUT SOME
09:11AM 8 OF THE SPECIFIC ASPECTS. AND I WILL JUST TALK ABOUT THE
09:11AM 9 COMMANDS FIRST, THE MULTI-WORD COMMANDS.

09:11AM 10 SO THE FIRST THING IS THAT WHEN DR. BLACK GOES THROUGH
09:11AM 11 THIS, WHEN HE'S SUPPOSEDLY LOOKING FOR WIDESPREAD COMMON USAGE
09:11AM 12 OF THESE THINGS WITH WHICH USERS HAVE BECOME FAMILIAR, HE
09:11AM 13 EXCLUDES SOME OF WHAT HE ACKNOWLEDGES ARE MAJOR PLAYERS IN THE
09:11AM 14 INDUSTRY.

09:11AM 15 FOR EXAMPLE, THE JUNIPER OS. HE LOOKS AT JUNIPER BUT HE
09:11AM 16 LOOKS AT A VERSION OF THEIR OPERATING SYSTEM THAT IS NO LONGER
09:11AM 17 BEING SOLD, RIGHT. HE DOESN'T LOOK AT THE WIDESPREAD -- THE
09:11AM 18 ONE THAT'S BEING USED NOW.

09:11AM 19 SO THAT'S A BIG -- WHAT HE WOULD DEFINE TO BE A MAJOR
09:12AM 20 PLAYER IN THE INDUSTRY. NEXT HE EXCLUDES HUAWEI, ANOTHER ONE
09:12AM 21 HE SAYS IS A MAJOR PLAYER. HE ALSO EXCLUDES PEOPLE WHO USE
09:12AM 22 DIFFERENT KINDS OF USER INTERFACES. SO A CLI, STANDS FOR A
09:12AM 23 COMMAND LINE INTERFACE, ONE TYPE OF USER INTERFACE, KIND OF
09:12AM 24 LIKE THE OLD DOS PROGRAMS WHERE YOU TYPE IN CERTAIN COMMANDS
09:12AM 25 AND GET CERTAIN RESPONSES.

09:12AM 1 THE COURT: SO YOU HAVE TO GET ME OVER THE LINE OF
09:12AM 2 THIS JUST BEING PROPER CROSS-EXAMINATION.

09:12AM 3 MR. NELSON: ABSOLUTELY.

09:12AM 4 THE PROBLEM HERE IS, IS THERE SOMETHING THAT'S HELPFUL FOR
09:12AM 5 THE JURY, RIGHT. WE HAVE A TEST THAT HE HAS STATED, WE CAN'T
09:12AM 6 FIND IT IN THE LITERATURE, RIGHT, SO THERE'S NO PUBLICATIONS
09:12AM 7 AND NO MARKETING ANALYSIS. AND IN FACT, EVEN THAT LAST PIECE
09:12AM 8 WHICH I THINK IS THE CRUX OF HIS ISSUE, IS TO TRY TO SHOW THAT
09:12AM 9 CUSTOMERS HAVE SOMEHOW RELIED ON THAT. NOW I WILL SET ASIDE
09:13AM 10 WHETHER THAT'S EVEN RELEVANT TO ANY ISSUES FOR NOW, BUT LET'S
09:13AM 11 TAKE THAT AS A GIVEN, YOUR HONOR. THERE'S NO MARKET SURVEY
09:13AM 12 HERE THAT WAS DONE, THERE WAS NOTHING THAT SAYS, OH, OKAY, YOU
09:13AM 13 CUSTOMERS, YOU KNOW, YOU ALL THINK THIS IS THE COMMON WAY TO DO
09:13AM 14 IT.

09:13AM 15 AND YOU KNOW IF YOU EXCLUDE MAJOR PLAYERS WHO HE SAID
09:13AM 16 HIMSELF DON'T DO IT THAT WAY, RIGHT, IN FACT HE SAID THE REASON
09:13AM 17 WHY HE DIDN'T EXCLUDE THOSE IS THERE WOULDN'T HAVE BEEN ANY
09:13AM 18 OVERLAP IN THE COMMANDS.

09:13AM 19 SO WE KNOW THERE ARE OTHER WAYS THAT ARE OUT THERE THAT
09:13AM 20 SWITCHES ARE SELLING. SO IF YOU ARE GOING TO USE THAT AS A
09:13AM 21 TEST, THAT CUSTOMERS EXPECT THIS, AND THAT'S PART OF HIS TEST
09:13AM 22 THAT I JUST READ, RIGHT, USE CUSTOMERS WHO PURCHASE AND USE
09:13AM 23 SUCH DEVICES HAVE BECOME AND ARE FAMILIAR.

09:13AM 24 WELL, THAT TEST PRESUMES, EVEN HIS OWN TEST, BEING AS
09:13AM 25 SUBJECTIVE AS IT IS, PRESUMES THERE WOULD BE SOME TYPE OF

09:13AM 1 ANALYSIS LIKE THAT.

09:14AM 2 AND THERE ISN'T. THERE'S MERELY A SURVEY TO GO THROUGH AND
09:14AM 3 COUNT, I'M STICKING WITH THE MULTI-WORD COMMANDS, HOW MANY
09:14AM 4 TIMES HE SEES THESE IN CERTAIN DEVICES.

09:14AM 5 NOW IN THE CHARTS THAT ARE INCLUDED, AND THAT'S LARGELY IN
09:14AM 6 EXHIBIT G IN THE MATERIALS AND TO HIS REPORT, IT'S ABOUT 20
09:14AM 7 THAT HE LOOKS AT. AND CERTAINLY THERE ARE SOME OF THESE
09:14AM 8 COMMANDS --

09:14AM 9 THE COURT: 20 VENDORS.

09:14AM 10 MR. NELSON: YEAH, SOMEWHERE RIGHT AROUND THERE, I
09:14AM 11 DON'T REMEMBER THE EXACT NUMBER.

09:14AM 12 THE COURT: NOT 20 COMMAND LINES, I JUST WANT TO BE
09:14AM 13 CLEAR ON THE RECORD.

09:14AM 14 MR. NELSON: CORRECT. IN TERMS OF COMMANDS, HE
09:14AM 15 LOOKED AT 400 SOMETHING THAT WERE LISTED IN THERE. THERE WERE
09:14AM 16 50 SOME OF THE CURRENT SET OF 508 THAT I THINK YOUR HONOR HAS
09:14AM 17 HEARD THAT NUMBER A FEW TIMES, THAT HE DIDN'T LOOK AT THAT AT
09:14AM 18 ALL AND THAT'S BECAUSE NOBODY USED THEM, AND IT IS, WELL, THAT
09:14AM 19 NUMBER WOULD HAVE BEEN ZERO.

09:14AM 20 BUT IF YOU LOOK AT THAT AND IF WE CAN GO TO THE LAST SLIDE,
09:15AM 21 YOUR HONOR, AND I DON'T KNOW IF MY EYES ARE THAT GOOD ANYMORE,
09:15AM 22 BUT YOU WILL SEE HERE, THIS IS JUST AN EXAMPLE, WE HAVE MANY,
09:15AM 23 MANY COMMANDS LISTED HERE WHERE THE NUMBERS ARE 3 AND 2 AND 1,
09:15AM 24 AND THEN WE KNOW THAT THERE'S MANY THAT ARE ZERO AS WELL.

09:15AM 25 SO -- BUT THERE'S NO STATEMENT AS TO WHETHER THESE

09:15AM 1 EXAMPLES, THESE ASPECTS OF THE WORK ARE THINGS THAT UNDER
09:15AM 2 DR. BLACK'S TEST, HE WOULD CONTEND TO BE "DE FACTO INDUSTRY
09:15AM 3 STANDARD" VERSUS NOT DE FACTO INDUSTRY STANDARD.

09:15AM 4 SO I UNDERSTAND, YOUR HONOR, THAT OFTEN TIMES, AND THIS
09:15AM 5 HAPPENS WITH EXPERT TESTIMONY, YOU MAY NOT HAVE A TRUE BRIGHT
09:15AM 6 LINE LIKE WHEN YOU HAVE 22 OF 27 THAT MEETS MY TEST, RIGHT, I
09:16AM 7 UNDERSTAND THAT YOU DON'T HAVE THAT, BUT WE AT LEAST HAVE SOME
09:16AM 8 KIND OF BALLPARK, SOME KIND OF PARAMETERS ON THERE THAT IT
09:16AM 9 WOULD BE ABOUT A THIRD, THOSE KINDS OF THINGS.

09:16AM 10 AND WHAT WE HAVE HERE IS REALLY NOTHING. THERE'S NO
09:16AM 11 COMMITMENT IN TERMS OF THE TESTIMONY FROM THE WITNESS AS TO
09:16AM 12 WHEN CERTAIN ASPECTS, RIGHT, WOULD BE THIS DE FACTO STANDARD --

09:16AM 13 THE COURT: SO -- AND MAYBE THIS IS A QUESTION FOR
09:16AM 14 ARISTA, BUT THE WAY YOU BREAK IT DOWN, THEN I WOULD ACTUALLY BE
09:16AM 15 LOOKING -- I MIGHT FIND THAT ONE COMMAND LINE IS UNIVERSALLY
09:16AM 16 USED, BUT DO I HAVE TO LOOK AT EACH ONE?

09:16AM 17 BECAUSE THROUGHOUT THIS CASE, I'M BEING GIVEN WHAT YOU
09:16AM 18 MIGHT CALL A COMPILATION OR WHAT MIGHT BE, OR SOMETHING, BUT IS
09:16AM 19 IT -- BUT IF DR. BLACK IS TELLING ME THAT CISCO CLI IS THE DE
09:16AM 20 FACTO STANDARD BUT YOU ARE SAYING THAT HIS OWN EVIDENCE SHOWS
09:17AM 21 THAT CERTAIN ELEMENTS ARE CISCO CLI ARE RARELY CARRIED OVER TO
09:17AM 22 OTHER VENDORS OF THESE SWITCHES, I'M LEFT WITH NOT KNOWING WHAT
09:17AM 23 UNIVERSE I'M LOOKING AT, IF I'M DECIDING DE FACTO STANDARD
09:17AM 24 ELEMENT-BY-ELEMENT OR AS A WHOLE IF 20 PERCENT OF THE INDUSTRY
09:17AM 25 USES OR ADOPTED 80 PERCENT OF CISCO'S CLI -- AND I'VE MADE

09:17AM 1 THOSE NUMBERS UP --

09:17AM 2 MR. NELSON: AND THAT'S A VERY GOOD QUESTION,
09:17AM 3 YOUR HONOR, AND THAT'S PART OF THE PROBLEM IS THAT HE DOESN'T
09:17AM 4 TELL US, RIGHT.

09:17AM 5 SO THE WORK, AS I THINK THERE WAS SOME RECENT BRIEFING THAT
09:17AM 6 WE TALKED ABOUT, THE WORK THAT WE ARE TALKING ABOUT HERE IS THE
09:17AM 7 CLI, WHICH IS A USER INTERFACE, IT'S THE WAY TO DO IT, THAT'S
09:17AM 8 THE WAY THE USER INTERACTS WITH THE PROGRAM.

09:17AM 9 NOW WE, CISCO, HAVE IDENTIFIED CERTAIN ASPECTS, THAT USER
09:18AM 10 INTERFACE, RIGHT, THAT WE BELIEVE ARE NOT ONLY PROTECTABLE BUT
09:18AM 11 ARE ASPECTS OF THINGS THAT ARISTA HAS COPIED, RIGHT, USED,
09:18AM 12 SUBSTANTIALLY SIMILAR, THOSE TYPES OF THINGS.

09:18AM 13 SO IT WOULD BE SIMILAR IF YOU HAD A BOOK, RIGHT, IF WE HAVE
09:18AM 14 A BOOK -- AND I KEEP GOING BACK TO THAT BECAUSE THIS IS ONE OF
09:18AM 15 THE THINGS I KNOW ARE COPYRIGHTED OR CAN BE, YOU COULD GO
09:18AM 16 THROUGH WORD-BY-WORD OR LINE-BY-LINE OR SENTENCE-BY-SENTENCE TO
09:18AM 17 SAY THIS SENTENCE IS COPIED, THIS SENTENCE ISN'T AND TABULATE
09:18AM 18 THOSE THINGS.

09:18AM 19 THERE ARE CERTAIN ASPECTS LIKE HOW THE CHARACTERS ARE
09:18AM 20 DEVELOPED AND THOSE KINDS OF THINGS, THEN THERE'S A QUESTION OF
09:18AM 21 WHETHER THERE'S SUBSTANTIAL SIMILARITY AND A DETERMINATION
09:18AM 22 MADE, WHICH IS A FACTUAL DETERMINATION.

09:18AM 23 SO THERE ARE SOME STATEMENTS IN DR. BLACK'S REPORT WHERE HE
09:18AM 24 INDICATES THAT HE MAY BE TALKING ABOUT THE CISCO CLI AS A
09:19AM 25 WHOLE, RIGHT. BUT THEN THE TEST BECOMES EVEN WORSE BECAUSE WE

09:19AM 1 KNOW HE DIDN'T LOOK AT SOME OF THE ASPECTS, RIGHT, LIKE THE
09:19AM 2 HELP DESCRIPTIONS, FOR EXAMPLE, OF THE ASSERTED ELEMENTS.

09:19AM 3 AND WE ALSO KNOW BY HIS OWN STATEMENTS IN THE DEPOSITION
09:19AM 4 WHERE HE SAYS IF HE WERE DOING THE ANALYSIS, IN OTHER WORDS, IF
09:19AM 5 I WERE TRYING TO LOOK TO SEE WHETHER THE CLI WAS AS A WHOLE WAS
09:19AM 6 INDUSTRY STANDARD, I WOULD LOOK AT DIFFERENT THINGS, RIGHT.
09:19AM 7 BUT WE DON'T KNOW WHAT THOSE DIFFERENT THINGS ARE.

09:19AM 8 SO WHAT HE'S FOCUSED IN, AND I UNDERSTAND ARISTA'S
09:19AM 9 CONTENTION IS I FOCUSED ON THOSE THINGS BECAUSE THOSE ARE THE
09:19AM 10 ASPECTS THAT CISCO IS ALLEGING, YOU KNOW, IN TERMS OF THOSE ARE
09:19AM 11 WHERE THE SUBSTANTIAL SIMILARITIES ARE IN THE WORK, THAT'S
09:19AM 12 FINE, EXCEPT FOR THE FACT THAT WE NOW HAVE A GENTLEMAN THAT'S
09:19AM 13 OFFERING TESTIMONY ON THIS DE FACTO INDUSTRY STANDARD WHERE WE
09:20AM 14 DON'T KNOW, ONE, EVEN WHERE THE BALLPARK IS, WHEN DOES
09:20AM 15 SOMETHING HAVE ENOUGH SIMILARITY WITH OTHER THINGS OUT THERE IN
09:20AM 16 THE MARKETPLACE SUCH THAT IT BECOMES A DE FACTO STANDARD, AND
09:20AM 17 WHEN IT DOES NOT. WE DON'T KNOW THIS GENTLEMAN'S OPINION AS TO
09:20AM 18 WHAT THOSE THINGS ARE THAT SHOULD BE COMPARED, BECAUSE WE KNOW
09:20AM 19 FROM HIS DEPOSITION TESTIMONY, HE SAYS AS AN EXPERT IN THIS
09:20AM 20 AREA, IN OTHER WORDS, I WILL JUST USE THE TERM SCIENTIFIC AND
09:20AM 21 ENGINEER, HE WOULD LOOK AT DIFFERENT THINGS, RIGHT.

09:20AM 22 SO WE HAVE SOMEBODY THAT'S -- HE'S OFFERING AN AMORPHOUS
09:20AM 23 OPINION OF CERTAIN ELEMENTS THAT IS CISCO IS CLAIMING. AND
09:20AM 24 SAYS, I FIND THOSE TO BE COMMON BUT WE DON'T KNOW WHERE THE
09:20AM 25 LINE IS OR EVEN THE BALLPARK IS TO WHEN THOSE ELEMENTS

09:20AM 1 THEMSELVES BECOME COMMON ENOUGH IN HIS MIND THAT CUSTOMERS ARE
09:20AM 2 FAMILIAR AND WANT THOSE, AS OPPOSED -- AND THEN FURTHER, WE
09:21AM 3 DON'T KNOW IF HE'S TALKING ABOUT THE CONGLOMERATION OF THESE
09:21AM 4 THINGS THAT CISCO POINTS TO, AND HOW THOSE COMPARE TO WHEN
09:21AM 5 SOMETHING WOULD BECOME WHAT HE SAYS IS AN INDUSTRY STANDARD
09:21AM 6 USER INTERFACE AS A WHOLE VERSUS NOT.

09:21AM 7 WHAT WE KNOW IS -- WHAT HE'S OFFERING IS TO SAY, OKAY,
09:21AM 8 CISCO IS POPULAR, CISCO IS, YOU KNOW, HAS SPENT TIME DEVELOPING
09:21AM 9 A PLACE IN THE MARKET AND MANY CUSTOMERS ARE FAMILIAR WITH WHAT
09:21AM 10 CISCO IS DOING, AND SOME OF THOSE THINGS REPEAT. BUT THAT'S
09:21AM 11 NOT HELPFUL TESTIMONY TO A JURY, RIGHT.

09:21AM 12 THE COURT: SO HERE'S -- I THINK THAT A COUPLE THINGS
09:21AM 13 CAME OUT IN THE OPPOSITION, AND IT WAS REALLY IN RESPONSE TO
09:21AM 14 YOUR ARGUMENT THAT THE OPINION IS NOT RELEVANT.

09:21AM 15 AND WHAT ARISTA ARGUES IS THEY IDENTIFY THE SPECIFIC
09:21AM 16 ASPECTS OF THE CASE THAT DR. BLACK'S TESTIMONY WOULD BE
09:22AM 17 RELEVANT TO. AND CERTAINLY IT WAS ACKNOWLEDGED BY ARISTA THAT
09:22AM 18 A DE FACTO STANDARD DOESN'T MEAN IT'S FREE TO THE REST OF THE
09:22AM 19 INDUSTRY. SO THAT'S NOT WHAT WE ARE TALKING ABOUT HERE.

09:22AM 20 BUT GIVEN THAT ARISTA HAS ACKNOWLEDGED RELEVANCE TO FAIR
09:22AM 21 USE, ESTOPPEL AND DAMAGES, AND I WOULD CERTAINLY, IF I ALLOW
09:22AM 22 THE TESTIMONY, WOULD ALLOW YOU TO PREPARE A LIMITING
09:22AM 23 INSTRUCTION SO THAT THE JURY UNDERSTANDS THAT, AND OF COURSE
09:22AM 24 ESTOPPEL IS NOT GOING TO THE JURY, DAMAGES MIGHT, FAIR USE
09:22AM 25 WILL, PRESUMABLY, IT'S A JURY ISSUE.

09:22AM 1 THAT, IN A SENSE, CUSHIONS THE BLOW ON THE TESTIMONY OR
09:22AM 2 GIVES, IN MY VIEW, THE COURT, A LITTLE MORE LATITUDE TO ALLOW
09:22AM 3 IT IN BECAUSE IT'S SO DIRECTED TO A PARTICULAR PART OF THE
09:22AM 4 CASE.

09:22AM 5 AND SO I WANTED YOUR COMMENT ON THAT.

09:22AM 6 MR. NELSON: AND I UNDERSTAND AT LEAST CONCEPTUALLY
09:23AM 7 HOW THOSE THINGS MAY BE ARGUED. BUT WHAT WOULD BE ARGUED TO BE
09:23AM 8 THE FAIR USE DEFENSE WOULD BE THE FACTS OUT THERE.

09:23AM 9 FOR EXAMPLE, IF YOU HAD SOMETHING WHERE CUSTOMERS HAVE
09:23AM 10 BECOME FAMILIAR AND CUSTOMERS EXPECT THESE THINGS AND THE ARE
09:23AM 11 USING THESE THINGS AND THERE MAY BE EVIDENCE THAT, AS THEY HAVE
09:23AM 12 ALLEGED OR THEY WANT TO OFFER, THAT CISCO WOULD ENCOURAGE THAT
09:23AM 13 KIND OF THING, PERHAPS YES, ON THOSE FACTS YOU COULD ARGUE FAIR
09:23AM 14 USE.

09:23AM 15 BUT THAT'S NOT WHAT WE ARE DOING HERE. WHAT THEY ARE
09:23AM 16 TRYING TO SAY IS HAVE A GENTLEMAN GET UP THERE UNDER THE GUISE
09:23AM 17 OF BEING A PHD, WE WILL CALL HIM DOCTOR, WHICH RIGHT THERE
09:23AM 18 GENERALLY LENDS ITSELF SOME CREDENCE WITH THE JURY, TO SAY THIS
09:23AM 19 HAS BECOME AN INDUSTRY STANDARD, RIGHT, DE FACTO INDUSTRY
09:23AM 20 STANDARD.

09:23AM 21 WE KNOW THERE ARE INDUSTRY STANDARDS IN A TOTALLY DIFFERENT
09:23AM 22 CONTEXT --

09:24AM 23 THE COURT: SO IEEE DEFINES DE FACTO INDUSTRY
09:24AM 24 STANDARD, CORRECT.

09:24AM 25 MR. NELSON: IEEE SAYS, I DON'T THINK THAT I WOULD,

09:24AM 1 THAT THEY NECESSARY HAVE A DEFINITION ABOUT WHAT SOMETHING IS.
09:24AM 2 BUT IN THE CONTEXT THEY ARE TALKING ABOUT IS AGAIN, AS AN
09:24AM 3 INTEROPERABILITY ISSUE, RIGHT.

09:24AM 4 SO THEY USE AN EXAMPLE, DR. BLACK, I KNOW IN HIS EXPERT
09:24AM 5 REPORT, USES AN EXAMPLE OF THIS INTERNET PROTOCOL, TCP IP. AND
09:24AM 6 FRANKLY, THERE WAS A FORUM THAT GOT TOGETHER AND DECIDED WHAT
09:24AM 7 THE PROTOCOLS WERE GOING TO BE, BUT EVEN IF WE DIDN'T HAVE THAT
09:24AM 8 IN ORDER TO TALK TO EACH OTHER THESE SYSTEMS WOULD NEED TO USE
09:24AM 9 THAT PROTOCOL OTHERWISE THEY CAN'T TALK TO EACH OTHER.

09:24AM 10 YOU MAY NOT HAVE THE INDUSTRY PLAYERS GETTING TOGETHER AND
09:24AM 11 FORMALLY SAYING THIS IS WHAT THE STANDARD IS AND DEFINING IT,
09:24AM 12 BUT BY USAGE YOU COULD HAVE THAT.

09:24AM 13 WE DON'T HAVE THAT AT ALL HERE, RIGHT. THERE'S NO
09:24AM 14 ALLEGATION, IN FACT THERE'S ADMISSION THAT YOU DON'T NEED TO
09:25AM 15 USE THIS USER INTERFACE IN ORDER TO HAVE YOUR SWITCHES OPERATE
09:25AM 16 TOGETHER. SO IT'S NOT AN INTEROPERABILITY ISSUE, RIGHT.

09:25AM 17 WHAT THE ALLEGATION IS RATHER, IS USERS ARE FAMILIAR,
09:25AM 18 RIGHT, SO IN OTHER WORDS IT'S KIND OF LIKE A LANGUAGE, IF YOU
09:25AM 19 GET USED TO SPEAKING A CERTAIN LANGUAGE, YOU LIKE TO SPEAK THAT
09:25AM 20 LANGUAGE AND MAYBE YOU DON'T WANT TO LEARN A NEW LANGUAGE OR
09:25AM 21 YOU DON'T WANT TO LEARN SOME NEW VOCABULARY, SO WE WILL USE
09:25AM 22 THAT ANY WAY.

09:25AM 23 BUT WE KNOW THAT ISN'T A REQUIREMENT IN THIS INDUSTRY
09:25AM 24 BECAUSE WE HAVE MAJOR INDUSTRY PLAYERS LIKE THE JUNIPER OS AND
09:25AM 25 HUAWEI AND SOME OF THE OTHERS THAT DON'T USE THAT AND THEY ARE

09:25AM 1 VERY PROMINENT PLAYERS IN THE EITHER NET SWITCH MARKET.

09:25AM 2 SO THAT, I THINK IS A VERY DIFFERENT, AND FRANKLY A
09:25AM 3 MISLEADING USE OF THE IEEE DEFINITION. AND WHEN WE HAVE
09:25AM 4 SOMEBODY WITH THE TITLE OF DOCTOR AND EXPERT AND QUALIFIED BY
09:26AM 5 THE COURT, ALL THOSE THINGS WOULD HAPPEN --

09:26AM 6 THE COURT: SO MR. SEIFERT WOULD BE BETTER, IN YOUR
09:26AM 7 MIND, TO GO FORWARD ON THIS BECAUSE HE DOESN'T HAVE THE
09:26AM 8 DOCTORATE.

09:26AM 9 MR. NELSON: THAT'S A FAIR POINT, BUT NO.

09:26AM 10 SO WITHOUT ANY REAL PARAMETERS ON THIS -- SO I DON'T
09:26AM 11 NECESSARILY HAVE A PROBLEM WITH THE GENTLEMAN OFFERING THE
09:26AM 12 FACTS, I LOOKED AT THESE THINGS AND THIS IS HOW MANY TIMES I
09:26AM 13 SEE THESE COMMANDS, RIGHT. I DON'T NECESSARILY HAVE A PROBLEM
09:26AM 14 WITH THAT. I'M NOT SURE WHERE THAT FALLS, BUT I GUESS, YOU
09:26AM 15 KNOW, IT'S ANALYSIS THAT WAS DONE FOR PURPOSES OF THE CASE AND
09:26AM 16 COULD BE EXPERT TESTIMONY. BUT TO DRAW THE CONCLUSION THAT
09:26AM 17 THIS IS SOMEHOW A DE FACTO INDUSTRY STANDARD --

09:26AM 18 THE COURT: SO IF DR. BLACK HAD TO COUCH HIS OPINION
09:26AM 19 BASED ON THESE, THE FACTS AS HE OBSERVED THEM TO SHOW THAT THE
09:27AM 20 USAGE IS COMMON OR FREQUENT, THAT'S --

09:27AM 21 MR. NELSON: I THINK THAT'S A VERY DIFFERENT
09:27AM 22 SITUATION.

09:27AM 23 THE COURT: OKAY.

09:27AM 24 AND I WILL ASK, I WON'T ASK YOU THIS, I JUST DON'T KNOW
09:27AM 25 THAT THIS CONCEPT OF DE FACTO INDUSTRY STANDARD HAS EVER BEEN

09:27AM 1 USED AS A DEFENSE IN A COPYRIGHT CASE LIKE THIS. SO I HAVE --
09:27AM 2 I WILL ASK ARISTA THAT, THAT'S NOT YOUR --

09:27AM 3 MR. NELSON: I'M NOT AWARE OF ONE, YOUR HONOR.

09:27AM 4 THE COURT: I DON'T THINK YOU WOULD BE.

09:27AM 5 MR. NELSON: NO.

09:27AM 6 SO -- AND IN A CRUX, THAT REALLY IS THE ISSUE WITH THAT

09:27AM 7 THE COURT: IT'S A BIG HEAVY TITLE TO CALL IT A DE
09:27AM 8 FACTO INDUSTRY STANDARD.

09:27AM 9 SO I CERTAINLY APPRECIATE PUTTING ASIDE THE PERSUASIVENESS
09:27AM 10 OF A QUALIFIED EXPERT GETTING ON THE WITNESS STAND, THAT I DO
09:27AM 11 AGREE WITH YOU THAT EXPERTS HAVE A LOT OF SWAY WITH JURORS,
09:27AM 12 THAT'S WHY YOU BRING THEM IN. BUT THIS TITLE IS PRETTY HEAVY
09:27AM 13 DUTY.

09:27AM 14 AND EVEN THOUGH THE PARTIES, ARISTA AGREES THAT THEY ARE
09:28AM 15 NOT SUGGESTING THAT BY BECOMING DE FACTO IT'S BECOME FREE, THE
09:28AM 16 JURY MAY NOT EVER PICK UP THAT NUANCE.

09:28AM 17 AND SO I APPRECIATE THIS UNSTATED PREJUDICE THAT COULD BE
09:28AM 18 OUT THERE THAT ARISTA WOULD NEVER ARGUE IT'S FREE, I'M SURE
09:28AM 19 THEY WOULDN'T, IT'S NOT THE LAW, BUT I SHARE YOUR CONCERN THAT
09:28AM 20 A JURY MIGHT NOT PICK UP ON THAT.

09:28AM 21 MR. NELSON: PARTICULARLY WHEN THE MOST LIKELY
09:28AM 22 THING WHEN A JURY WOULD HEAR THE TERM "INDUSTRY STANDARD," IS
09:28AM 23 THE KIND OF THING THAT WE HEAR BACK AND FORTH WHERE PEOPLE CAN
09:28AM 24 USE, IN FACT, IT'S EXPECTED THAT THEY ALL USE THOSE INTERFACES.
09:28AM 25 SETTING ASIDE ANY COMPENSATION, I'M NOT TALKING ABOUT FRAND,

09:28AM 1 YOUR HONOR.

09:28AM 2 THE COURT: NO, NO, I UNDERSTAND THAT.

09:28AM 3 MR. NELSON: SO WITH THAT I WILL MOVE ON.

09:28AM 4 THE COURT: GOOD. AND I SLOWED DOWN, TOO, SO WE
09:28AM 5 REALLY HAVE TO KEEP MOVING.

09:28AM 6 WHO IS GOING TO, FOR ARISTA, GOING TO TAKE THIS?

09:28AM 7 MR. FERRALL: YOUR HONOR, I'M GOING TO START, BUT I
09:28AM 8 WOULD ACTUALLY, BECAUSE IT COVERS BOTH EXPERTS AND I'M TALKING
09:29AM 9 ABOUT MR. SEIFERT, AND MR. WONG IS TALKING ABOUT DR. BLACK, WE
09:29AM 10 ARE GOING TO SPLIT THIS A LITTLE BIT, BUT I WANT TO START IF I
09:29AM 11 CAN.

09:29AM 12 THE COURT: SURE. LET ME JUST TELL YOU THAT MY VERY
09:29AM 13 FIRST QUESTION IS HAS AN OPINION REGARDING DE FACTO INDUSTRY
09:29AM 14 STANDARD EVER, TO YOUR KNOWLEDGE, BEEN PUT FORTH AT A TRIAL TO
09:29AM 15 ADDRESS THE ISSUES OF FAIR USE?

09:29AM 16 AND I'M NOT AS CONCERNED ABOUT ESTOPPEL BECAUSE THAT WILL
09:29AM 17 COME TO ME AND I COULD AGREE OR DISAGREE WITH THE OPINION, I'M
09:29AM 18 NOT GOING TO WORRY ABOUT THAT, DAMAGES OR FAIR USE?

09:29AM 19 MR. FERRALL: NOT THAT I KNOW OF, YOUR HONOR. I'M
09:29AM 20 NOT AWARE.

09:29AM 21 AND TO BE FAIR, DE FACTO STANDARDS DON'T ARISE THAT OFTEN.
09:29AM 22 WE HAVE EXAMPLES, MR. SEIFERT HAS LAID OUT IN HIS REPORT SOME
09:29AM 23 HISTORICAL EXAMPLES OF HOW TECHNOLOGIES HAVE BECOME DE FACTO
09:29AM 24 STANDARDS.

09:29AM 25 THE COURT: BECAUSE TO ME THIS IS HIGHLY RELEVANT TO

09:29AM 1 THE ISSUE OF ESTOPPEL. BUT I'M PUTTING THAT COMPLETELY ASIDE
09:30AM 2 NOW BECAUSE THAT'S NOT A JURY ISSUE.

09:30AM 3 MR. FERRALL: RIGHT.

09:30AM 4 THE COURT: SO I'M JUST VERY CONCERNED, THIS IS A
09:30AM 5 POWERFUL OPINION THAT COULD MEAN SOMETHING VERY DIFFERENT TO A
09:30AM 6 LAY JURY. AND I DON'T KNOW WHEN IT BECOMES -- AS I SAID, THIS
09:30AM 7 IS JUST SO FUZZY TO ME.

09:30AM 8 SO I KNOW IT WHEN I SEE IT, IS REALLY WHAT I GLEAN FROM
09:30AM 9 DR. BLACK, AND MR. SEIFERT IS THAT I LOOKED AT IT ALL AND I
09:30AM 10 THINK CISCO USES THIS BLACK BOX ANALOGY, THEY COMMENT ON IT,
09:30AM 11 AND, YOU KNOW, I LOOKED AT IT ALL, I SHOOK IT AROUND AND YEAH,
09:30AM 12 TO ME IT LOOKS LIKE IT'S BECOME DE FACTO, WITHOUT ANY
09:30AM 13 PERCENTAGES PUT ON IT.

09:30AM 14 AND I KNOW IT'S NOT A BRIGHT LINE, I DON'T MEAN TO SUGGEST
09:30AM 15 THAT, BUT IN SO MANY AREAS OF THE LAW, WE START LOOKING AT
09:30AM 16 SOMETHING APPROACHING 20 PERCENT, 30 PERCENT, SOME NUMBER THAT
09:30AM 17 BEGINS TO TELL US THAT IT'S WIDELY USED.

09:30AM 18 I DON'T HAVE ANY QUANTIFICATION THAT I CAN EVEN LOOK AT OR
09:30AM 19 THAT A JURY COULD REACT TO.

09:31AM 20 MR. FERRALL: LET ME CLARIFY A COUPLE OF THINGS, AND
09:31AM 21 MR. WONG WILL ELABORATE ON THIS.

09:31AM 22 BUT THE NOTION OF THE CISCO CLI, WHICH OF COURSE IS
09:31AM 23 SOMETHING WE HAVE TALKED ABOUT BEFORE AND I'M SURE WE WILL TALK
09:31AM 24 ABOUT AGAIN, AS A DE FACTO INDUSTRY STANDARD, THOSE ARE WORDS
09:31AM 25 THAT COME FROM CISCO, TO BE CLEAR. THERE ARE PLENTY OF CISCO

09:31AM 1 DOCUMENTS, AND WE WILL SHOW YOU EXAMPLES OF CISCO CALLING THEIR
09:31AM 2 CLI A DE FACTO INDUSTRY STANDARD.

09:31AM 3 THERE ARE EXAMPLES OF OTHER INDUSTRY VENDORS CALLING THE
09:31AM 4 CISCO CLI A DE FACTO INDUSTRY STANDARD.

09:31AM 5 SO WHEN IT COMES TO THE POWER OF THAT PHRASE, THAT'S A
09:31AM 6 PHRASE THAT'S COMING INTO THE CASE NO MATTER WHAT BECAUSE CISCO
09:31AM 7 HAS USED IT AND OTHERS HAVE USED IT.

09:31AM 8 THE COURT: SO THEN WE ARE TALKING ABOUT THE
09:31AM 9 COMPILATION THAT CISCO HAS DEFINED AS CISCO CLI AS A WHOLE.

09:32AM 10 MR. FERRALL: IT'S A GENERAL COMMENT, RIGHT.

09:32AM 11 THE COURT: BUT CISCO CLI IS A THING, IT'S A
09:32AM 12 COMPILATION, IT HAS BOUNDARIES. AND IF IT DOESN'T HAVE
09:32AM 13 BOUNDARIES, THEN I THINK THIS CASE IS GOING IN A WHOLE
09:32AM 14 DIFFERENT DIRECTION.

09:32AM 15 SO I AM PERSUADED THAT CISCO HAS PRESENTED THE BOUNDARIES
09:32AM 16 OF CISCO CLI, AND YOU CAN BE OR ARE INTIMATELY AWARE OF WHAT
09:32AM 17 EACH OF THE FEATURES AND ELEMENTS OF CISCO CLI IS, WHETHER IT'S
09:32AM 18 A LAWYER CONSTRUCT OR NOT IS NOT MY CONCERN NOW.

09:32AM 19 SO I READ DR. BLACK'S OPINIONS TO BE TALKING ABOUT CISCO
09:32AM 20 CLI AS A WHOLE AND LOOKING AT INDIVIDUAL, I DON'T THINK HE USES
09:32AM 21 THE WORD SPOT CHECKING, SO I DON'T WANT TO PUT THAT ON HIM, BUT
09:32AM 22 EVALUATING THE INDIVIDUAL FEATURES AND ELEMENTS OF WHAT IS
09:32AM 23 CISCO CLI TO SEE IF IT'S USED BY THE OTHER VENDORS.

09:32AM 24 BUT AT THE END OF THE DAY, HIS OPINION IS THAT BECAUSE OF
09:32AM 25 THE EVIDENCE HE FOUND ABOUT ELEMENTS AND FEATURES, HE CAN THEN

09:33AM 1 SAY WITH CONFIDENCE THAT THE ENTIRE CISCO CLI IS THE INDUSTRY
09:33AM 2 STANDARD. IS THAT FAIR?

09:33AM 3 MR. FERRALL: I DON'T THINK THAT'S RIGHT.

09:33AM 4 THE COURT: OKAY. SO HELP ME OUT.

09:33AM 5 MR. FERRALL: WHETHER CISCO CLI HAS BOUNDARIES FOR
09:33AM 6 PURPOSES OF DEFINING INFRINGEMENT, I THINK REMAINS TO BE SEEN.
09:33AM 7 I THINK THAT MERITS FURTHER DISCUSSION. BUT DOESN'T HAVE TO BE
09:33AM 8 IN THE CONTEXT OF THIS MOTION.

09:33AM 9 THE COURT: WELL, I DON'T KNOW THAT CISCO CLI IS A
09:33AM 10 THING. BUT THAT'S MY CONCERN THAT -- OR I GUESS MAYBE I SHOULD
09:33AM 11 SAY THAT I'M AFRAID THAT WHEN THE AUTHOR IS REVEALED, IT'S
09:33AM 12 GOING TO BE SOMEONE WITH A JD AFTER HIS NAME AND NOT A PHD.

09:33AM 13 MR. FERRALL: RIGHT.

09:33AM 14 BUT WHAT DR. BLACK DID, AND WHAT THEN MR. SEIFERT ALSO
09:33AM 15 RELIED UPON WAS FOCUSED ON THE ELEMENTS THAT ARE ASSERTED IN
09:33AM 16 THE CASE

09:33AM 17 THE COURT: SO THAT'S WHERE I'M CONCERNED THAT THEN
09:33AM 18 ALL HIS OPINION IS, IS THAT A PARTICULAR ELEMENT HAS BECOME A
09:34AM 19 DE FACTO STANDARD. AND FOR HIM THEN TO TAKE A NUMBER OF
09:34AM 20 ELEMENTS, I WON'T CATEGORIZE THEM AS FEW OR MANY, BUT A NUMBER
09:34AM 21 OF ELEMENTS THAT ARE LESS THAN THE WHOLE AND EXTRAPOLATE THAT
09:34AM 22 ON TO THE WHOLE IS A CONCERN OF MINE. THAT'S A METHODOLOGY
09:34AM 23 CONCERN THAT I HAVE.

09:34AM 24 MR. FERRALL: WELL, I GUESS THE RELEVANT ISSUE FOR
09:34AM 25 THE CASE, AND I WILL TALK ABOUT RELEVANCE, BUT THE RELEVANT

09:34AM 1 ISSUE FOR THE CASE IS WHETHER THE ASSERTED ELEMENTS OF THE
09:34AM 2 CISCO CLI HAVE, IN EFFECT, BECOME A DE FACTO STANDARD.

09:34AM 3 NOW WHEN CISCO TALKS ABOUT THEIR CLI BECOMING A DE FACTO
09:34AM 4 STANDARD, OF COURSE THEY ARE NOT ITEMIZING 500 COMMANDS AND 11
09:34AM 5 PROMPTS AND BLAH, BLAH, RIGHT. THEY ARE JUST SAYING IT. AND
09:34AM 6 THAT'S THE WAY DELL SAYS IT AND THAT'S THE WAY HP SAYS IT AND
09:34AM 7 SO FORTH. THEY ARE NOT ITEMIZING.

09:34AM 8 BUT HE'S DONE THE HOMEWORK, DR. BLACK THAT IS, AND LOOKED
09:34AM 9 AT IT ON A DETAILED BASIS, BECAUSE WHAT'S AT ISSUE IN THIS CASE
09:35AM 10 IS WHETHER THE ASSERTED ELEMENTS ARE STANDARDIZED, IN EFFECT,
09:35AM 11 DE FACTO STANDARDIZED, AND HE PRESENTS HIS EVIDENCE.

09:35AM 12 AND SURE, CISCO CAN CROSS-EXAMINE HIM AND SAY, LOOK, THESE
09:35AM 13 COMMANDS, THERE ARE ONLY THREE VENDORS THAT USE THEM, AND HE
09:35AM 14 WILL EXPLAIN WHY MAYBE FEWER VENDORS USE CERTAIN COMMANDS
09:35AM 15 BECAUSE THOSE FEATURES AREN'T IN PLAY, WHATEVER, THAT'S ALL FOR
09:35AM 16 CROSS-EXAMINATION.

09:35AM 17 THE COURT: SURE.

09:35AM 18 MR. FERRALL: BUT HE DID THE HARD WORK SPANNING
09:35AM 19 HUNDREDS OF PAGES OF EXHIBITS, AND GOD KNOWS HOW MANY HOURS OF
09:35AM 20 TIME LOOKING AT THOUSANDS AND THOUSANDS OF PAGES OF MANUALS AND
09:35AM 21 EXTRACTING THE COMMANDS AND TRYING TO SEE THIS USAGE, ALL TO
09:35AM 22 EXPLAIN WHAT IS IMPORTANT EVIDENCE IN THE CASE. AND THAT IS
09:35AM 23 THAT CISCO AND MULTIPLE OTHER VENDORS REFER TO THIS AS A DE
09:35AM 24 FACTO STANDARD.

09:35AM 25 SO THE JURY, I THINK IT'S IMPORTANT THAT THE JURY

09:35AM 1 UNDERSTAND --

09:36AM 2 THE COURT: SO HOW DO I SEPARATE AN EXPERT'S OPINION
09:36AM 3 FROM A COMPANY'S PUFFING ABOUT ITS PRODUCT?

09:36AM 4 YOU KNOW -- AND IT'S NOT THAT I WOULD EXCLUDE THE EVIDENCE
09:36AM 5 OF WHAT CISCO SAYS ABOUT ITS OWN PRODUCT, I'M NOT SAYING THAT,
09:36AM 6 BUT IT REALLY KIND OF BEGS THE QUESTION, AND YOU KNOW,
09:36AM 7 GENERALLY, I'M JUST UNCOMFORTABLE WITH THOSE STATEMENTS BEING
09:36AM 8 USED, PERHAPS AS A VERY TANGENTIAL BOLSTERING OF THE ULTIMATE
09:36AM 9 OPINIONS THAT GLEANED FROM THE HARD WORK THAT YOU POINT OUT.

09:36AM 10 MR. FERRALL: WELL, HERE'S THE THING, ACTUALLY, IF WE
09:36AM 11 COULD JUST, WHILE WE ARE TALKING ABOUT THIS, PULL UP THE
09:36AM 12 SEIFERT SLIDE 22.

09:36AM 13 THE COURT: YOU WANT ME TO LOOK AT SEIFERT OR BLACK.

09:37AM 14 MR. FERRALL: SEIFERT.

09:37AM 15 MR. VAN NEST: IT'S ON THE SCREEN TOO, YOUR HONOR.

09:37AM 16 THE COURT: IT'S EASIER IF I CAN LOOK AT THE PAPER
09:37AM 17 AND LOOK AT YOU.

09:37AM 18 MR. FERRALL: SO YOU MENTIONED IEEE DEFINITION. WE
09:37AM 19 INCLUDED THE DE FACTO STANDARD MR. SEIFERT USED IN HIS REPORT
09:37AM 20 AS COMPARED TO THE IEEE DEFINITION. IT IS A DEFINITION, IT'S
09:37AM 21 IN THE IEEE GLOSSARY, AND IT DOESN'T HAVE TO DO WITH
09:37AM 22 INTEROPERABILITY AT ALL, THAT'S NOT THE POINT OF THIS. THE
09:37AM 23 POINT IS IT IS A LITTLE CLOUDY AROUND THE EDGES. NOBODY CAN
09:37AM 24 SAY THAT SOMETHING THAT COMES INTO COMMON USAGE AND IS USED HAS
09:37AM 25 A BRIGHT LINE.

09:37AM 1 THE COURT: SO RELEVANCE IS ONE OF THE ISSUES RAISED.

09:37AM 2 SO OKAY, IT WAS HELPFUL TO ME WHEN I BECAME AWARE THROUGH
09:37AM 3 YOUR PAPERS THAT I IEEE GIVES US A DEFINITION, SO YOU DIDN'T
09:37AM 4 MAKE IT UP, SO THIS IS WELL RESPECTED, THIS IS THE ENTITY ONE
09:38AM 5 WOULD LOOK TO.

09:38AM 6 BUT THEN I GET BACK TO THE QUESTION OF HOW IS THIS
09:38AM 7 DEFINITION USED, WHAT DOES THIS MEAN?

09:38AM 8 YOU WANT TO SUGGEST TO THE JURY THAT IT'S OKAY FOR ARISTA
09:38AM 9 TO USE THESE FEATURES AND ELEMENTS BECAUSE THEY HAVE BECOME A
09:38AM 10 DE FACTO STANDARD. THAT AGAIN BEGS THE QUESTION OF, IS IT
09:38AM 11 FREE?

09:38AM 12 AND SO I'M VERY CONCERNED ABOUT THAT UNDERLYING IMPLICATION
09:38AM 13 OF WHAT A STANDARD IS. AND OF COURSE THE JURY CAN BE EXPRESSLY
09:38AM 14 INSTRUCTED THAT STANDARDS ARE NOT THEN AVAILABLE TO COMPETITORS
09:38AM 15 FOR NO PAYMENT. I CAN CERTAINLY INSTRUCT THEM ON THAT, BUT I
09:38AM 16 STILL HAVE SOME CONCERNS ABOUT THE IMPLICATIONS.

09:38AM 17 MR. FERRALL: WELL, YOUR HONOR, FAIR USE CONSIDERS
09:38AM 18 WHETHER THE COPYRIGHT HOLDER WOULD HAVE CONSIDERED THE USE FAIR
09:38AM 19 AT THE TIME IN LIGHT OF WHAT WAS GOING ON IN THE -- THE WALL
09:39AM 20 DATA CASE, WE CITE THAT, AND I THINK THE QUOTE FROM THAT, IF I
09:39AM 21 HAVE IT RIGHT, IS THAT THE CUSTOM AT THE TIME WOULD HAVE
09:39AM 22 DEFINED THE USE AS REASONABLE.

09:39AM 23 AND THE PURPOSE OF THIS TESTIMONY AND ALL OF THE EVIDENCE
09:39AM 24 THAT DR. BLACK GIVES, THE BACKGROUND EXPLANATION OF HOW
09:39AM 25 TECHNOLOGIES BECOME DE FACTO STANDARDS THAT MR. SEIFERT GIVES,

09:39AM 1 IS TO EXPLAIN TO THE JURY HOW IN THIS FIELD, AT THIS TIME IN
09:39AM 2 THE LATE 2000'S, WHEN ARISTA STARTED DEVELOPING ITS CLI, HOW IT
09:39AM 3 WAS FAIR, EVEN IN CISCO'S MIND, FOR OTHER VENDORS TO USE THESE
09:39AM 4 WORDS, THESE SHORT PHRASES, ET CETERA.

09:39AM 5 AND THAT'S WHAT IT GOES TO, YOUR HONOR. IT'S A FUNDAMENTAL
09:39AM 6 DEFENSE. IT'S NOT AT ALL THE CASE, AS YOU'VE SAID, AND WE HAVE
09:39AM 7 SAID IN OUR PAPERS, IT'S NOT AT ALL THE CASE THAT WE ARE GOING
09:39AM 8 TO SAY IT'S A DE FACTO STANDARD, THEREFORE IT'S NOT
09:40AM 9 COPYRIGHTABLE. THAT'S NOT THE DEFENSE.

09:40AM 10 BUT IT'S VERY CLEAR THAT THE JURY IS ENTITLED TO AND NEEDS
09:40AM 11 TO UNDERSTAND WHAT THE STATE OF THE MARKET OF THESE VENDORS
09:40AM 12 WERE AT THE TIME AND WHAT WAS EXPECTED TO BE, WHAT WAS EXPECTED
09:40AM 13 TO BE FAIR USE AND NOT.

09:40AM 14 THE COURT: WELL, YOU KNOW, I CERTAINLY THINK IT'S
09:40AM 15 RELEVANT TO FAIR USE.

09:40AM 16 I DON'T THINK -- YOU LIMITED THE RELEVANCE, I APPRECIATE
09:40AM 17 WHAT YOU SAID IN YOUR BRIEFING ABOUT IT, I CAN INSTRUCT A JURY
09:40AM 18 ON HOW THEY ARE TO CONSIDER IT FOR A LIMITED PURPOSE ONLY. AND
09:40AM 19 THEN THE QUESTION IS, IS IT LEGITIMATE OPINION TESTIMONY, DOES
09:40AM 20 IT HAVE A PROPER METHODOLOGY BEHIND IT.

09:40AM 21 MR. FERRALL: RIGHT.

09:40AM 22 THE COURT: AND SO I STILL GET BACK TO MY FUZZINESS
09:40AM 23 ABOUT WHERE'S THE LINE, WHAT'S THE DEMARCATION BETWEEN -- WHEN
09:40AM 24 DOES SOMETHING CROSSOVER TO BE A DE FACTO STANDARD?

09:41AM 25 MR. FERRALL: BUT I THINK THAT'S -- YOUR HONOR, I

09:41AM 1 THINK THAT'S SOMETHING FOR THE JURY TO DELIBERATE ON.

09:41AM 2 IF WE CAN GO TO THE NEXT SLIDE, FOR EXAMPLE. AND SO THIS
09:41AM 3 IS, I JUST -- BECAUSE I HAVE THE RESPONSIBILITY FOR
09:41AM 4 MR. SEIFERT, I SELECTED HIS EXHIBITS. DR. BLACK ATTACHED MUCH
09:41AM 5 MORE.

09:41AM 6 THE COURT: OKAY. SURE.

09:41AM 7 MR. FERRALL: BUT MR. SEIFERT REFERRED TO JUST A
09:41AM 8 COUPLE EXHIBITS, AND THIS WAS I THINK EXHIBIT, I GUESS HIS
09:41AM 9 REPORT EXHIBIT C, WHERE HE OBSERVES THE COMMONALITY OF THE
09:41AM 10 MODES AND THE PROMPTS ACROSS VENDORS.

09:41AM 11 SO I'VE ATTACHED JUST TWO PAGES OF ABOUT A 10 PAGE OR 12
09:41AM 12 PAGE EXHIBIT. AND YOU HAVE THE CISCO ASSERTED MODE ON THE LEFT
09:41AM 13 AND PROMPT, AND THEN HE RUNS FOR, I DON'T KNOW HOW MANY
09:41AM 14 VENDORS, BUT MULTIPLE DOZENS OF VENDORS, HE NOTES WHAT MODES
09:42AM 15 WERE AVAILABLE FROM THESE VENDORS.

09:42AM 16 AND THE FIRST PAGE HERE WE'VE GOT ALCATEL AND LUCENT, BUT
09:42AM 17 GO TO THE NEXT PAGE WHICH IS THE -- SO HERE WE HAVE VENDORS AS
09:42AM 18 PROMINENT AS NORTEL, AVAYA, FOUNDRY, BROCADE, DELL, FORCE10.
09:42AM 19 THESE ARE PEOPLE WHO CISCO IDENTIFIED IN DEPOSITION AS SOME OF
09:42AM 20 THEIR PRIMARY COMPETITORS IN VARIOUS SUBMARKETS. YOU SEE
09:42AM 21 ALMOST IDENTICAL MODES ACROSS THE LINE.

09:42AM 22 AND HE GOES ON. SO THE POINT IS, IF THERE'S A VENDOR WHO
09:42AM 23 DOESN'T HAVE THE SAME MODES, FINE, THE JURY CAN CONSIDER THAT
09:42AM 24 AND SAY WELL, MAYBE IT WASN'T SUCH A STANDARD, BUT THAT'S A
09:42AM 25 FACTUAL ISSUE FOR THE JURY TO CONSIDER.

09:42AM 1 BUT WE ARE NOT, NEITHER MR. SEIFERT NOR DR. BLACK IS MAKING
09:42AM 2 UP THIS TERM "DE FACTO STANDARD" AND PULLING IT OUT OF THIN
09:43AM 3 AIR. IT'S IN THE EXISTING DOCUMENTS PRIOR TO LITIGATION BY THE
09:43AM 4 PARTIES BY THIRD PARTIES, AND IT'S AN ACCEPTED IEEE TERM

09:43AM 5 THE COURT: OKAY. BUT YOU ARE SUGGESTING THAT I
09:43AM 6 SHOULD BE THE FIRST ONE TO APPLY IT.

09:43AM 7 MR. FERRALL: WELL, I'M SUGGESTING --

09:43AM 8 THE COURT: NO JUDGE WANTS TO BE THE FIRST.

09:43AM 9 MR. FERRALL: THIS IS A CASE IN WHICH THE EVIDENCE
09:43AM 10 OVERWHELMINGLY SUPPORTS THE RELEVANCE OF THIS TERM AS ITS BEEN
09:43AM 11 USED THROUGHOUT THE INDUSTRY. 4.

09:43AM 12 SO IF THERE WERE A CASE ABOUT ETHERNET BEFORE IT WAS
09:43AM 13 STANDARDIZED BY IEEE, MAYBE SO. MAYBE IT'S AN INDICATION THAT
09:43AM 14 PEOPLE DON'T USUALLY ASSERT COPYRIGHT OVER SOMETHING THAT'S
09:43AM 15 BECOME A DE FACTO STANDARD SO IT DOESN'T COME INTO LITIGATION,
09:43AM 16 MAYBE THAT'S WHY IT HASN'T BEEN RAISED BEFORE.

09:43AM 17 THE COURT: AND WHO IS -- I'M GOING TO HEAR SOME MORE
09:43AM 18 ON DR. BLACK?

09:43AM 19 MR. WONG: YES, YOUR HONOR.

09:43AM 20 RYAN WONG FOR ARISTA NETWORKS AND MR. FARRELL DID A GOOD
09:44AM 21 JOB OF ADDRESSING YOUR HONOR'S QUESTIONS I'M JUST GOING TO PUT
09:44AM 22 A LITTLE MORE MEAT ON THE BONE.

09:44AM 23 BUT I WANTED TO ADDRESS AN ISSUE, YOUR HONOR. IT SOUNDED
09:44AM 24 LIKE CISCO'S COUNSEL CONCEDED THAT THE ONLY CHALLENGE WITH
09:44AM 25 RESPECT TO THE DE FACTO INDUSTRY STANDARD CLI THAT THEY HAVE IS

09:44AM 1 THE LABEL OF DE FACTO STANDARD AND THE UNDERLYING DATA WHICH
09:44AM 2 SPANS HUNDREDS OF PAGES AS WELL AS APPENDIXES OF DR. BLACK'S
09:44AM 3 REPORT, IS NOT THE SUBJECT OF THIS MOTION. IN FACT, THAT HAS
09:44AM 4 TO BE THE CASE BECAUSE HE NEVER ATTACHED THE APPENDIXES TO THE
09:44AM 5 ORIGINAL MOTION.

09:44AM 6 AND I NOTE, YOUR HONOR, IN TERMS OF THE ACTUAL PARAGRAPHS
09:44AM 7 OF DR. BLACK'S REPORT THEY CITE IN THEIR MOTION, ONLY FOUR OF
09:44AM 8 THEM, OPENING REPORT PHOTOGRAPHS 90 AND 171, AND REBUTTAL
09:44AM 9 REPORT PARAGRAPHS 126 AND 131, REFER TO DR. BLACK'S CONCLUSION
09:44AM 10 THAT THERE ARE DE FACTO INDUSTRY STANDARD CLI FEATURES.

09:44AM 11 THE REST OF THE PARAGRAPHS THAT THEY CITE WHICH IS
09:44AM 12 APPROXIMATELY 15 PARAGRAPHS JUST GIVE GENERAL BACKGROUND ABOUT
09:45AM 13 THE IEEE AND THE --

09:45AM 14 THE COURT: YES.

09:45AM 15 MR. WONG: SO THOSE WOULD REMAIN REGARDLESS.

09:45AM 16 NOW MR. FERRALL WAS WALKING THE COURT THROUGH DR. BLACK'S
09:45AM 17 APPROACH AT HIS DE FACTO INDUSTRY STANDARD OPINION.

09:45AM 18 AND JUST LIKE MR. SEIFERT, DR. BLACK USED WHAT IS A -- THIS
09:45AM 19 IS SLIDE TWO OF DR. BLACK'S PRESENTATION. JUST LIKE
09:45AM 20 MR. SEIFERT DR. BLACK USED A DEFINITION OF DE FACTO STANDARD,
09:45AM 21 WHICH IS COMMON WITH HIS OWN UNDERSTANDING AND EXPERIENCE IN
09:45AM 22 THE INDUSTRY, AS WELL AS CONSISTENT WITH WHAT TECHNICAL
09:45AM 23 PUBLICATIONS SAY.

09:45AM 24 AND HE CITES A COUPLE OF THEM IN HIS ACTUAL REPORT. AND HE
09:45AM 25 SIMPLY APPLIED THAT TO THE INDUSTRY STANDARD CLI FEATURES THAT

09:45AM 1 HE HAD WORKED WITH PERSONALLY BEFORE THIS CASE EVEN STARTED AS
09:45AM 2 WELL AS BASED UPON HIS ANALYSIS OF, AS MR. FERRALL SAID, OVER
09:46AM 3 20 DIFFERENT NETWORKING VENDORS.

09:46AM 4 NOW MR. FERRALL NOTED THERE WAS OVERWHELMING EVIDENCE THAT
09:46AM 5 THE DISPUTED CLI FEATURES WERE USED BY ALL THE VENDORS THAT
09:46AM 6 DR. BLACK LOOKED AT, INCLUDING ALL OF CISCO'S MAJOR
09:46AM 7 COMPETITORS. AND THIS IS JUST A SUMMARY, YOUR HONOR, OF THE
09:46AM 8 FINDINGS IN DR. BLACK'S REPORT. MR. FERRALL SHOWED THE ACCUSED
09:46AM 9 MODES AND PROMPTS. WELL OVER 20 VENDORS IN ADDITION TO CISCO
09:46AM 10 AND ARISTA USED THE SAME ACCUSED MODES AND PROMPTS.

09:46AM 11 YOU CAN LOOK AT THE HIERARCHIES, THESE ARE WHAT CISCO CALLS
09:46AM 12 THESE COMMANDS THAT START WITH THE COMMON FIRST WORD, THERE ARE
09:46AM 13 11 OF THEM THAT THEY ASSERT. ALL 11 ARE USED BY AT LEAST SEVEN
09:46AM 14 OTHER VENDORS, AND THAT'S IN ADDITION TO CISCO AND ARISTA. AND
09:46AM 15 IN FACT, NINE OF THEM ARE USED BY OVER 13 OTHER VENDORS.

09:46AM 16 AND I THINK THE SHOW COMMANDS, THE CLEAR COMMANDS.

09:46AM 17 THE COURT: HOW MANY VENDORS ARE THERE, THOUGH? 13
09:46AM 18 OUT OF 1,000 WOULDN'T BE VERY IMPRESSIVE. 13 OUT OF 20 WOULD
09:47AM 19 BE.

09:47AM 20 MR. WONG: DR. BLACK TESTIFIED, AND I THINK HE'S
09:47AM 21 RIGHT THAT HE COVERED ALL THE CISCO'S MAJOR COMPETITORS AS WELL
09:47AM 22 AS SMALLER PLAYERS IN THE FIELD. WHEN HE WAS ASKED ABOUT THE
09:47AM 23 ONES HE MIGHT HAVE MISSED, DR. ALMEROTH BASICALLY POINTS TO A
09:47AM 24 WIKIPEDIA PAGE SAYING, LOOK AT THESE OTHER VENDORS YOU DIDN'T
09:47AM 25 LOOK AT.

09:47AM 1 AND DR. BLACK AT HIS DEPOSITION SAID, I LOOKED AT THAT
09:47AM 2 WIKIPEDIA PAGE AND THERE WERE A COUPLE OF COMPANIES FROM KOREA
09:47AM 3 THAT I DIDN'T THINK WOULD BE RELEVANT TO AN ANALYSIS HERE.

09:47AM 4 SO DR. ALMEROOTH DIDN'T ACTUALLY LIST ANY MAJOR VENDORS THAT
09:47AM 5 DR. BLACK DIDN'T ANALYZE.

09:47AM 6 AND TO THE CONTRARY OF WHAT CISCO SAYS IN THEIR MOTION,
09:47AM 7 DR. BLACK DID LOOK AT THE HUAWEI CLI AS WELL AS THE JUNO CLI.
09:47AM 8 IN FACT, HE MENTIONS THEM IN HIS REPORT AND HE ACKNOWLEDGES
09:47AM 9 THAT THEY ARE DIFFERENT IN VARIOUS RESPECTS.

09:47AM 10 THE COURT: OKAY.

09:47AM 11 MR. WONG: AND I THINK THE LAST THING I WANT TO
09:47AM 12 HIGHLIGHT FOR THE COURT, YOUR HONOR, IS MR. FERRALL NOTED THAT
09:47AM 13 CISCO ITSELF, BEFORE THIS LITIGATION WAS EVEN FILED, REFERRED
09:48AM 14 TO ITS OWN CLI AS FOLLOWING A DE FACTO STANDARD.

09:48AM 15 AND THESE ARE ALL EXCERPTS FROM DR. BLACK'S REPORT. HERE
09:48AM 16 WE HAVE CISCO TALKING ABOUT IT, BUT WE ALSO HAVE DELL AND
09:48AM 17 JUNIPER, TWO MAJOR COMPETITORS OF CISCO ALL REFERRING TO THEIR
09:48AM 18 CLI'S AS INDUSTRY STANDARD CLI IN THEIR PUBLIC DOCUMENTATION.

09:48AM 19 AND YOUR HONOR, WE DEPOSED DELL AND JUNIPER AND THEY
09:48AM 20 CONFIRMED IN THEIR DEPOSITION THAT THIS INDUSTRY STANDARD CLI
09:48AM 21 THAT THEY ARE TALKING ABOUT -- AND IT'S CONFIDENTIAL SO I WON'T
09:48AM 22 GO INTO DETAILS, BUT THEY SAID IT'S THE MODES, IT'S THE
09:48AM 23 COMMANDS, IT'S EVEN THE RESPONSES.

09:48AM 24 THOSE ARE THE THINGS THAT ARE COMMON ACROSS THE INDUSTRY,
09:48AM 25 THAT'S WHAT WE MEAN WHEN WE SAY INDUSTRY STANDARD CLI.

09:48AM 1 SO WE HAD THE OPPORTUNITY TO ASK THESE COMPANIES WHAT DID
09:48AM 2 YOU MEAN WHEN YOU SAID THIS, AND IT'S THE SAME DEFINITION THAT
09:48AM 3 DR. BLACK APPLIES WHEN HE SAYS THESE FEATURES ARE STANDARD.

09:48AM 4 AND JUST THREE MORE EXAMPLES OF OTHER COMPETITORS.

09:48AM 5 WITH THAT YOUR HONOR, IF YOU HAVE ANY QUESTIONS.

09:49AM 6 THE COURT: OKAY. NO. THANK YOU.

09:49AM 7 MR. FERRALL, DID YOU WANT TO COMMENT ON MR. SEIFERT'S
09:49AM 8 OPINION ON MARKET EFFECT BEFORE WE MOVE ON TO IT? BECAUSE I'M
09:49AM 9 KEEPING AN EYE ON THE TIME AND WE ARE RUNNING BEHIND.

09:49AM 10 MR. FERRALL: RIGHT.

09:49AM 11 THE MARKET EFFECT REPORT, YOUR HONOR, I THINK YOUR HONOR'S
09:49AM 12 CONCERN WAS THAT THERE WAS NOT A MARKET SURVEY, I WOULD SUBMIT
09:49AM 13 IN THIS CASE IT'S NOT THE SORT OF QUESTION THAT'S REALLY
09:49AM 14 SUITABLE TO A MARKET SURVEY.

09:49AM 15 THE QUESTION IS, DOES HAVING COMMON CLI ELEMENTS AFFECT THE
09:49AM 16 CAUSE MARKET HARM TO CISCO, THAT'S THE --

09:49AM 17 THE COURT: SO IN THE PATENT ARENA, THIS IS EXACTLY
09:49AM 18 THE STANDARD I WOULD HOLD AN EXPERT TO IS DOING A SURVEY WHEN
09:49AM 19 I'M LOOKING AT APPORTIONMENT, THE APPORTIONMENT ISSUE, SO
09:49AM 20 WHAT'S DRIVING SALES.

09:49AM 21 SO I'M -- AND MAYBE MY ANALOGY IS INCORRECT SO I WANT TO
09:50AM 22 LET YOU CORRECT MY UNDERSTANDING.

09:50AM 23 MR. FERRALL: I DON'T THINK -- I WOULD -- I DON'T
09:50AM 24 THINK THAT A MARKET SURVEY WOULD BE, I FRANKLY DON'T THINK THAT
09:50AM 25 IT WOULD BE VERY EFFECTIVE HERE. BUT EVEN IF IT COULD BE

09:50AM 1 EFFECTIVE, I DON'T THINK IT'S THE ONLY WAY TO EVALUATE WHETHER
09:50AM 2 THERE WAS MARKET HARM.

09:50AM 3 IN THIS CASE WHAT MR. SEIFERT LOOKED AT, RATHER THAN A
09:50AM 4 RESPONSE FROM A CUSTOMER WHICH MIGHT BE BASED UPON, YOU KNOW,
09:50AM 5 3, 4, 5 YEARS MEMORY, HE LOOKED AT ACTUAL DOCUMENTS, RFP'S,
09:50AM 6 THAT'S REQUEST FOR PROPOSALS, FROM CUSTOMERS. HE LOOKED AT
09:50AM 7 COMMUNICATIONS BETWEEN CUSTOMERS AND ARISTA. AND HE LOOKED AT
09:50AM 8 MARKET SHARE.

09:50AM 9 SO HE LOOKED AT OBJECTIVE PRE-EXISTING FACTS TO DETERMINE
09:51AM 10 THAT DECISIONS DO NOT APPEAR TO HAVE BEEN MADE BASED UPON THE
09:51AM 11 CLI.

09:51AM 12 AND THEN JUST LOOKING OBJECTIVELY AT THIRD PARTY DATA ABOUT
09:51AM 13 WHOSE MARKET SHARE CHANGED AND HOW MUCH DID THEY HAVE A
09:51AM 14 CISCO-LIKE CLI. HE FOUND NO RELATIONSHIP. IN FACT, HE FOUND
09:51AM 15 THAT SOME OF THE VENDORS WITH LESS OF A CISCO-LIKE CLI DID
09:51AM 16 BETTER THAN SOME THAT HAVE MORE OF A CISCO-LIKE CLI.

09:51AM 17 NOW MIGHT YOU BE ABLE TO CONSTRUCT A SURVEY THAT WOULD PASS
09:51AM 18 MUSTER, PERHAPS, BUT I THINK LOOKING AT THE OBJECTIVE
09:51AM 19 PRE-EXISTING FACTS AND DATA IS CERTAINLY A VIABLE WAY OF
09:51AM 20 OPINING ABOUT MARKET HARM, IN THIS CASE WHERE YOU ARE SPANNING
09:51AM 21 A NUMBER OF YEARS BACK AND A LOT OF DIFFERENT CUSTOMERS,
09:51AM 22 DIFFERENT MARKET SEGMENTS AND SO FORTH.

09:51AM 23 THE COURT: SO I GUESS TO ME THE PROBLEM WITH
09:52AM 24 SEIFERT'S OPINION WAS IT SEEMED ANECDOTAL.

09:52AM 25 AND I'M CONCERNED ABOUT THAT BECAUSE I DON'T KNOW WHAT

09:52AM 1 VIABILITY, I'M LOOKING AT PARAGRAPH 101, 102 OF HIS REPORT,
09:52AM 2 WHERE HE TALKS ABOUT SOME OF THE CUSTOMERS, AND I KNOW A LOT OF
09:52AM 3 THIS IS PROBABLY CONFIDENTIAL, SO I DON'T NEED TO IDENTIFY
09:52AM 4 THAT, BUT THERE IS, IN PARAGRAPH 101 THERE'S A LONG LIST OF
09:52AM 5 CUSTOMERS AND WHAT THEY HAVE DONE.

09:52AM 6 AND PARAGRAPH 102, I KNOW FROM THE EVIDENCE AVAILABLE FROM
09:52AM 7 THESE CUSTOMERS OR PROSPECTIVE CUSTOMERS, NO ONE MENTIONED A
09:52AM 8 CISCO CLI OR INDUSTRY STANDARD CLI ON THEIR LIST OF SWITCH
09:52AM 9 PRODUCT REQUIREMENTS.

09:52AM 10 SO I MEAN, THE TROUBLE I HAVE WITH THIS IS THAT IT'S A
09:52AM 11 LIMITED GROUP OF CUSTOMERS OR POTENTIAL CUSTOMERS AND A
09:52AM 12 STATEMENT, AN OPINION BASED ON THE ABSENCE, AND I GUESS THAT'S
09:53AM 13 IN THE RFQ'S OR THE RFP'S THEY PUT OUT FOR THE SWITCHES.

09:53AM 14 MR. FERRALL: AND YOUR HONOR, I WOULD SAY, WITHOUT
09:53AM 15 GETTING INTO THE DETAILS OF WHO IS NAMED HERE, BUT THESE ARE --
09:53AM 16 I THINK THE EVIDENCE WILL SHOW THAT THESE ARE, THEY MAKE UP BY
09:53AM 17 FAR THE LION'S SHARE OF ARISTA'S SALES. AND THEREFORE, TO THE
09:53AM 18 EXTENT THERE'S AN OUTLIER OR THERE'S SOME OTHER SEGMENT OF THE
09:53AM 19 MARKET OR SOME OTHER CUSTOMER, THAT SEEMS TO BE APPROPRIATE
09:53AM 20 GROUNDS FOR CROSS-EXAMINATION AND THE JURY CAN WEIGH WHETHER
09:53AM 21 THAT CUSTOMER'S DESIRE FOR A CISCO-LIKE CLI WOULD HAVE MADE A
09:53AM 22 DIFFERENCE TO THEM OR NOT. I MEAN, THAT'S GOING TO BE --

09:53AM 23 THE COURT: SO IT SEEMS LIKE YOU ARE FIGHTING ACROSS
09:53AM 24 PURPOSES WITH MR. SEIFERT TO SAY CISCO CLI IS AN INDUSTRY
09:53AM 25 STANDARD AND THEN TO SAY, ACTUALLY NOBODY WANTS THIS, SO I

09:53AM 1 DON'T KNOW WHERE THAT GOES.

09:53AM 2 MR. FERRALL: WELL, IT'S A MATTER OF MARKET HARM,
09:54AM 3 IT'S A MATTER OF --

09:54AM 4 THE COURT: IT CAN'T BE A STANDARD IF -- THAT'S THE
09:54AM 5 PROBLEM I'M HAVING WITH THAT. AND MAYBE THAT'S NOT FOR ME,
09:54AM 6 MAYBE THAT'S FOR CLOSING ARGUMENT TO THE JURY IS YOU CAN'T HAVE
09:54AM 7 IT BOTH WAYS.

09:54AM 8 MR. FERRALL: MAYBE IT IS FOR CLOSING ARGUMENT.

09:54AM 9 BUT TO BE CLEAR, THE DE FACTO STANDARD OPINIONS AS WE HAVE
09:54AM 10 JUST EXPLAINED, THEY COME FROM WHAT VENDORS USED, WHAT VENDORS
09:54AM 11 USED IN THE INDUSTRY.

09:54AM 12 WE ARE NOT BASING THAT DE FACTO STANDARD OPINION BASED UPON
09:54AM 13 A SURVEY OF CONSUMERS OBVIOUSLY OR CUSTOMERS, WE ARE BASING IT
09:54AM 14 UPON WHAT WAS REASONABLE IN THE INDUSTRY TO USE BECAUSE
09:54AM 15 EVERYONE USED IT, NO ONE COMPLAINED ABOUT IT, EVERYONE THOUGHT
09:54AM 16 THAT IT WAS FINE, CISCO SAID IT WAS A DE FACTO STANDARD AND
09:54AM 17 THAT'S HOW IT CAME ABOUT.

09:54AM 18 IT'S A LITTLE BIT DIFFERENT QUESTION TO LOOK AT, WELL, HOW
09:55AM 19 WERE PARTICULAR ARISTA SALES DRIVEN. AND SPECIFICALLY, CAN
09:55AM 20 CISCO POINT TO OR IS THERE EVIDENCE THAT THE USE OF THESE CLI
09:55AM 21 ELEMENTS CAUSED MARKET HARM, THAT'S THE RELEVANT ASSESSMENT FOR
09:55AM 22 FAIR USE.

09:55AM 23 THE COURT: BUT I GUESS I'M STILL ASKING YOU IF IT'S
09:55AM 24 AN INDUSTRY STANDARD BECAUSE IT'S BECOME SO COMMON THAT
09:55AM 25 EVERYONE WANTS TO USE IT, BUT THEN MR. SEIFERT IS GOING TO

09:55AM 1 TRANSITION TO HIS NEXT OPINION, BUT ON MARKET EFFECTS, ARISTA'S
09:55AM 2 CUSTOMERS ARE NOT BUYING SWITCHES BECAUSE OF THIS REALLY
09:55AM 3 IMPORTANT ALL ENCOMPASSING DE FACTO INDUSTRY STANDARD, IT
09:55AM 4 DOESN'T WORK. I DON'T KNOW WHAT I'M DOING THERE. I DO NOT
09:55AM 5 KNOW WHETHER THE OPINIONS GO OR IT'S -- AS I SAY, MAYBE I'VE
09:55AM 6 JUMPED INTO AN AREA I DON'T NEED TO BE IN BECAUSE THAT'S A
09:55AM 7 FACTUAL THAT THE JURY COULD SIMPLY DISREGARD.

09:55AM 8 MR. FERRALL: IT IS. AND I THINK -- I BELIEVE
09:56AM 9 THERE'S AN EXPLANATION FOR IT.

09:56AM 10 AND I'M TRYING TO GIVE IT TO YOU WHICH IS TO SAY THAT THE
09:56AM 11 MARKET HARM IS SPECIFIC TO ARISTA'S SALES THAT ARE ACCUSED IN
09:56AM 12 THIS CASE. WHAT SALE CAUSED HARM TO CISCO.

09:56AM 13 THOSE ARE, AS I'VE SAID, DRIVEN ALMOST ENTIRELY BY A SET OF
09:56AM 14 CUSTOMERS THAT ARE, MOST OF WHICH ARE ENUMERATED HERE IN
09:56AM 15 PARAGRAPH 101, WHOSE MARKET PURCHASE DECISIONS ARE DIFFERENT
09:56AM 16 THAN OTHERS. AND DIFFERENT THAN WHAT DRIVES THE DE FACTO
09:56AM 17 STANDARDIZATION FOR OTHER COMPANIES AND OTHER SUBMARKETS.

09:56AM 18 SO IT IS A FACTUAL ISSUE WHICH MAY BE OUR BURDEN TO EXPLAIN
09:56AM 19 TO THE JURY, COME TIME.

09:56AM 20 THE COURT: OKAY. ALL RIGHT.

09:56AM 21 MR. NELSON, I DON'T THINK YOU RESPONDED OR MADE ANY
09:56AM 22 COMMENTS ON MR. SEIFERT, AND I WAS JUST TRYING TO SAVE SOME
09:57AM 23 TIME SINCE MR. FERRALL HAD STARTED WITH MR. SEIFERT.

09:57AM 24 MR. NELSON: RIGHT. THANK YOU, YOUR HONOR.

09:57AM 25 SO BRIEFLY ON THE INDUSTRY STANDARD POINT, IN TERMS OF THE

09:57AM 1 UNDERLYING, YOU KNOW, IF IT THEY WANT TO TALK ABOUT COMMONALITY
09:57AM 2 AND THOSE KINDS OF THINGS, UNDERLYING DATA, I'VE ALREADY
09:57AM 3 ADDRESSED THAT POINT, BUT NOW THEY WANT TO OFFER THIS
09:57AM 4 DEFINITION THIS IEEE DEFINITION, VERY AMORPHOUS, VERY
09:57AM 5 SUBJECTIVE AND THEY NEVER PUT ANY PARAMETERS ON IT IT.

09:57AM 6 SO EVEN AS THEY GET UP HERE TO SAY WHETHER DOES THIS
09:57AM 7 HAPPEN, WHEN DOES SOMETHING BECOME, THAT'S THE PROBLEM BECAUSE
09:57AM 8 YOU HEARD FROM THEM, THEY WANT TO EQUATE THIS DEFINITION THAT
09:57AM 9 THEIR EXPERTS HAVE CREATED, EXCEPT FOR THEY HAVEN'T TOLD US
09:57AM 10 WHAT IT IS, FOR THIS LITIGATION, WITH STATEMENTS THAT ARE IN
09:57AM 11 THE DOCUMENTS.

09:57AM 12 WITNESSES CAN EXPLAIN THE DOCUMENTS, THE PEOPLE WHO CREATED
09:57AM 13 THEM FROM THIRD PARTIES CAN EXPLAIN THE DOCUMENTS, BUT TO HAVE
09:57AM 14 AN EXPERT WHO OFFERS NO OBJECTIVE CRITERIA, CAN POINT TO
09:57AM 15 NOTHING PRIOR TO THIS LITIGATION AS TO WHEN SOMETHING BECOMES
09:57AM 16 THIS DE FACTO INDUSTRY STANDARD THAT THEY ARE TALKING ABOUT AND
09:58AM 17 EQUATE THOSE WITH STATEMENTS THAT ARE IN THESE DOCUMENTS,
09:58AM 18 THAT'S WHERE THE CONFUSION COMES FROM AND THAT'S WHAT'S
09:58AM 19 IMPROPER WITH THIS TESTIMONY.

09:58AM 20 AND MR. SEIFERT, IN TERMS OF THAT, HE COMES UP WITH THIS
09:58AM 21 FOUR-FACTOR TEST THAT'S LISTED IN THE BRIEFING, AND EVERY
09:58AM 22 SINGLE ONE OF THEM, HIS RESPONSE AS TO WHEN IT HAPPENS IS MY
09:58AM 23 BUSINESS JUDGMENT, RIGHT.

09:58AM 24 NOT ONLY IS THAT TEST TRULY SUBJECTIVE UNDER THE DAUBERT
09:58AM 25 STANDARD, BUT HE SAYS EXPLICITLY THAT IT'S SUBJECTIVE.

09:58AM 1 AND THE MARKET HARM ANALYSIS THAT YOUR HONOR JUST HIT ON,
09:58AM 2 THAT COMES RIGHT DOWN TO THE CRUX OF THIS ISSUE, BECAUSE ON THE
09:58AM 3 ONE HAND WHAT THEY WANT TO SAY WITH THE INDUSTRY STANDARD IS
09:58AM 4 BASICALLY THIS IS A BARRIER TO ENTRY. EVERYBODY USES THIS,
09:58AM 5 EVERYBODY UNDERSTANDS, BECAUSE REMEMBER THAT DEFINITION THAT I
09:58AM 6 LOOKED AT FROM DR. BLACK, REFERS EXPLICITLY TO CUSTOMERS,
09:58AM 7 RIGHT, CUSTOMERS EXPECT, THEY BECOME FAMILIAR, THAT'S THE WHOLE
09:59AM 8 IDEA, THE WHOLE TRIGGER BEHIND THIS.

09:59AM 9 BECAUSE OTHERWISE IT MAKES NO SENSE, RIGHT, JUST BECAUSE A
09:59AM 10 LOT OF PEOPLE USE IT, IF CUSTOMERS DON'T CARE ABOUT IT AT ALL,
09:59AM 11 THAT WOULDN'T BE A DEFENSE TO ANYTHING.

09:59AM 12 SO ON THE ONE HAND THEY WANT TO SAY IT'S A BARRIER TO
09:59AM 13 ENTRY, THEN ON THE OTHER HAND THEY WANT MR. SEIFERT, THIS
09:59AM 14 GENTLEMAN BASED UPON THESE DOCUMENTS, TO SAY NOBODY BASES
09:59AM 15 BUYING DECISIONS AS A RESULT OF THAT.

09:59AM 16 BUT THINK ABOUT THIS WAY, CARS, RIGHT, THEY ALL HAVE FOUR
09:59AM 17 WHEELS OR TIRES OR HOWEVER YOU WANT TO SAY, RIGHT. EVERYBODY
09:59AM 18 HAS COME TO EXPECT THAT. BUT IF YOU LOOK AND YOU LIST ON THE
09:59AM 19 MARKETING MATERIALS OR IF YOU ASK CUSTOMERS WHY THEY BOUGHT THE
09:59AM 20 CAR, I'M SURE, I MEAN, I DON'T KNOW THIS 100 PERCENT, BUT I'M
09:59AM 21 PRETTY SURE NOBODY IS GOING TO SAY BECAUSE IT HAD FOUR WHEELS.

09:59AM 22 BUT IF YOU ASK THE QUESTION THE PROPER WAY, WHICH IS, WHAT
09:59AM 23 AN EXPERT WOULD NEED TO DO IN THIS CONTEXT, WHAT YOUR HONOR
09:59AM 24 JUST HIT ON WHICH IS, LET'S SAY YOUR CAR DIDN'T HAVE FOUR
10:00AM 25 WHEELS, IT WAS MISSING THE LEFT FRONT WHEEL; WOULD YOU BUY THAT

10:00AM 1 CAR? AND THE ANSWER IS OVERWHELMINGLY, NO, OF COURSE NOT.

10:00AM 2 SO THAT'S THE TENSION, BUT THEY DIDN'T DO THAT MARKET
10:00AM 3 ANALYSIS ON EITHER SIDE. THEY DIDN'T ASK THE CUSTOMERS, HEY,
10:00AM 4 DO YOU NEED THIS CLI, DO YOU NEED THIS USER INTERFACE, HAVE YOU
10:00AM 5 BECOME SO ACCUSTOMED TO IT SUCH THAT IF YOU DON'T HAVE IT YOU
10:00AM 6 ARE NOT GO GOING TO CONSIDER OTHER SWITCHES.

10:00AM 7 AND ON THE MARKET HARM, THEY NEVER ASK ANYBODY THE SAME
10:00AM 8 QUESTION WHICH IS WHAT THAT INTENTION IS.

10:00AM 9 SO WE HAVE AN EXPERT THAT DOESN'T WANT TO ASK THOSE
10:00AM 10 QUESTIONS BECAUSE THEY ARE COMPLETELY INTENTIONED BOTH WITH HIS
10:00AM 11 DEFINITION OF THE INDUSTRY STANDARD AND HIS MARKET HARM AND
10:00AM 12 THAT'S THE FUNDAMENTAL PROBLEM, YOUR HONOR.

10:00AM 13 THE COURT: OKAY. ALL RIGHT.

10:00AM 14 ARE WE READY TO MOVE ON? WHAT WOULD YOU LIKE TO MOVE ON TO
10:00AM 15 NEXT?

10:00AM 16 MR. PAK: YOUR HONOR, I WILL DEFER TO MR. FERRALL.

10:00AM 17 MR. FERRALL: THANK YOU. I THINK IT'S A GOOD CHOICE.
10:00AM 18 AND SO I WOULD LIKE TO TALK ABOUT DR. ALMEROOTH AND THE SOURCE
10:00AM 19 CODE.

10:00AM 20 THE COURT: OKAY. LET'S BEAT UP ON THE CISCO GROUP.

10:01AM 21 MR. FERRALL: THANK YOU. IT'S ABOUT TIME.

10:01AM 22 THE COURT: OKAY. AND MR. FERRALL, AS I MENTIONED TO
10:01AM 23 YOU AND MAYBE THIS IS FOR CISCO TO HELP ME OUT, I ACTUALLY
10:01AM 24 DIDN'T KNOW WHAT I WAS LOOKING AT ON SOME OF THESE COPYING
10:01AM 25 DOCUMENTS.

10:01AM 1 AND YOU KNOW, I LEARN ABOUT THE CASE THROUGH THESE EARLY
10:01AM 2 MOTIONS, AND BY THE TIME I GIVE IT TO THE JURY MAYBE I WILL
10:01AM 3 KNOW AS MUCH AS THEY DO, BUT I HAVE TO MAKE SOME IMPORTANT
10:01AM 4 DECISIONS NOW, AND THESE ARE, THESE WERE VERY DIFFICULT FOR ME
10:01AM 5 TO UNDERSTAND, SO DON'T HESITATE TO HELP ME OUT.

10:01AM 6 MR. FERRALL: OKAY. I HOPE YOUR HONOR WILL FORGIVE
10:02AM 7 ME. I'M NOT GOING TO TRY TO MAKE SENSE OF THOSE.

10:02AM 8 THE COURT: IF I DON'T NEED TO MAKE SENSE OF THEM,
10:02AM 9 THAT'S MUSIC TO MY EARS.

10:02AM 10 MR. FERRALL: I DON'T THINK YOU DO, AT LEAST FOR THIS
10:02AM 11 MOTION BECAUSE, YOUR HONOR, NONE OF THOSE COPYING DOCUMENTS
10:02AM 12 RELATE TO UPON THE SOURCE CODE COPYING OPINION THAT I WANT TO
10:02AM 13 TALK ABOUT RIGHT NOW. AND I WILL GET TO WHERE THERE MAY BE A
10:02AM 14 LITTLE BIT OF OVERLAP.

10:02AM 15 THE COURT: LIKE SO MANY CIRCUMSTANCES IN THIS CASE,
10:02AM 16 I FEEL LIKE YOU TWO ARE LITIGATING TWO DIFFERENT CASES HERE,
10:02AM 17 AND MAYBE THAT'S WHAT YOU ARE DOING, I DON'T KNOW.

10:02AM 18 MR. FERRALL: I HOPE NOT.

10:02AM 19 THE COURT: SO I CAN'T DISTINGUISH BETWEEN THE -- YOU
10:02AM 20 HAVE YOUR FIRST TWO ISSUES WHICH WERE COPYING OF THE SOURCE
10:02AM 21 CODE ON THE PARSER, SOURCE CODE AND HELP DESCRIPTIONS, HELP
10:02AM 22 DESK, THEY ARE THE SAME THING, CORRECT?

10:02AM 23 MR. FERRALL: NO, THOSE ARE TWO DIFFERENT OPINIONS.

10:02AM 24 THE COURT: YOUR MOTION IS ABOUT HELP DESCRIPTIONS.
10:03AM 25 IN YOUR REPLY BRIEF YOU MAKE THE DISTINCTION BETWEEN HELP

10:03AM 1 DESCRIPTION AND HELP DESK, AND I GOT LOST THERE.

10:03AM 2 MR. FERRALL: HELP DESK IS JUST SHORTHAND FOR HELP
10:03AM 3 DESCRIPTIONS.

10:03AM 4 THE COURT: OKAY. THAT'S WHAT I SAID, THEY ARE THE
10:03AM 5 SAME THING.

10:03AM 6 MR. FERRALL: YES, YES.

10:03AM 7 BUT THE PARSER OPINION IS DIFFERENT FROM HELP DESCRIPTIONS.

10:03AM 8 THE COURT: I'M SORRY. YES.

10:03AM 9 I THOUGHT IN YOUR REPLY BRIEF YOU WERE DRAWING A
10:03AM 10 DISTINCTION BETWEEN HELP DESK AND HELP DESCRIPTIONS, WHICH IN
10:03AM 11 FACT YOU DIDN'T BRIEF IN YOUR OPENING, AND I DIDN'T THINK THEY
10:03AM 12 WERE DIFFERENT.

10:03AM 13 MR. FERRALL: NO, THEY ARE NOT.

10:03AM 14 THE COURT: THEN WE ARE ON THE SAME PAGE.

10:03AM 15 MR. FERRALL: MY APOLOGIES IF THAT WAS CONFUSING.

10:03AM 16 I WANT TO SPEND MOST OF THE TIME TALKING ABOUT THE PARSER
10:03AM 17 OPINION BECAUSE I THINK CISCO HAS MADE A CONCESSION REGARDING
10:03AM 18 THE HELP DESCRIPTION PART OF THIS MOTION THAT MORE OR LESS
10:03AM 19 RESOLVES IT.

10:03AM 20 THE COURT: OKAY.

10:03AM 21 MR. FERRALL: HERE'S THE ISSUE WITH THE PARSER.

10:03AM 22 THIS IS LITIGATING TWO DIFFERENT CASES, YOUR HONOR IS RIGHT
10:03AM 23 TO THAT EFFECT BECAUSE THIS PARSER OPINION IS COMPLETELY
10:03AM 24 ORTHOGONAL TO EVERYTHING WE HAVE BEEN TALKING ABOUT IN THE
10:04AM 25 CASE.

10:04AM 1 THIS IS AN OPINION, IT'S NOT EVEN IN DR. ALMEROOTH'S REPORT,
10:04AM 2 NOWHERE IN HIS REPORT CAN YOU FIND A STATEMENT WHERE HE
10:04AM 3 CONCLUDES THAT THERE WAS COPYING OF SOURCE CODE BY ARISTA. YOU
10:04AM 4 CAN'T FIND THOSE WORDS. IT APPEARS, AND WE COULD GO TO THE
10:04AM 5 FIRST SLIDE HERE, IT APPEARS, IT SURFACED IN HIS DEPOSITION.

10:04AM 6 SO BY WAY OF BACKGROUND, IN HIS REPORT, HE INCLUDES A FEW
10:04AM 7 SORT OF AMBIGUOUS PARAGRAPHS, THE MOST NOTORIOUS ONE BEING
10:04AM 8 PARAGRAPH 83, WHERE HE REFERS TO CERTAIN BEHAVIOR OF THE ARISTA
10:04AM 9 PARSER, AND THEN HE SAYS, IN MY OPINION, THIS IS NONSTANDARD
10:04AM 10 BEHAVIOR AND IT IS PRESENT IN BOTH CISCO AND ARISTA PROGRAMS.

10:05AM 11 HE DOESN'T SAY WHERE IT'S PRESENT IN CISCO'S PROGRAMS, HE
10:05AM 12 DOESN'T CITE ANY FILES, HE DOESN'T COMPARE ANY SOURCE CODE, HE
10:05AM 13 DOESN'T SAY THAT THIS LEAD HIM TO A BELIEF THAT THERE WAS
10:05AM 14 COPYING OF SOURCE CODE.

10:05AM 15 BUT IN HIS DEPOSITION, WE ASKED HIM, WHAT'S THE
10:05AM 16 SIGNIFICANCE OF YOUR FINDING THIS PARSER BEHAVIOR NONSTANDARD?
10:05AM 17 BECAUSE AFTER ALL, YOUR HONOR IS FAMILIAR ENOUGH NOW WITH ALL
10:05AM 18 OF THE ACCUSATIONS AND THE ELEMENTS OF THE CLI, THERE'S NOTHING
10:05AM 19 ABOUT PARSER BEHAVIOR AMONG ANY IDENTIFIED COPYRIGHT SIMILARITY
10:05AM 20 THAT WE ARE HERE TO TRY. SO WHAT IS THIS ALL ABOUT, WHY DID
10:05AM 21 YOU IDENTIFY THIS?

10:05AM 22 AND THEN IN DEPOSITION HE SAYS FOR THE FIRST TIME, AND THIS
10:05AM 23 IS AN EXCERPT, HE SAYS, "WELL, IT INDICATES THAT I BELIEVE
10:05AM 24 THERE WAS SOURCE CODE COPYING."

10:05AM 25 AND THIS IS THE FOLLOW-UP QUESTION:

10:05AM 1 "QUESTION: SO WHAT YOU ARE TRYING TO SUGGEST HERE IS THAT
10:05AM 2 YOU THINK ARISTA WOULD HAVE COPIED CISCO'S PARSER SOURCE CODE?

10:06AM 3 "ANSWER: I THINK THAT'S THE OPINION I'M EXPRESSING."

10:06AM 4 NOW TO BE CLEAR, YOUR HONOR, LET ME BE UNEQUIVOCAL. ARISTA
10:06AM 5 CATEGORICALLY REJECTS THE NOTION THAT THERE WAS ANY COPYING OR
10:06AM 6 ANY INSINUATION EVEN OF COPYING OF SOURCE CODE.

10:06AM 7 IT DID NOT, IT NEVER HAPPENED, ARISTA WILL PROVE IT IF
10:06AM 8 NECESSARY, BUT TO BE FORCED TO PROVE THAT AT A TRIAL, THAT
10:06AM 9 DOESN'T PUT AT ISSUE COPYRIGHT INFRINGEMENT OF SOURCE CODE
10:06AM 10 BECAUSE IT'S NEVER BEEN DISCLOSED IN THIS CASE BEFORE.

10:06AM 11 THE COURT: WELL, IS THAT THEN A RULE 26 PROBLEM THAT
10:06AM 12 WE HAVE INSTEAD OF A DAUBERT?

10:06AM 13 MR. FERRALL: IT CAN BE, IT CAN ACTUALLY BE REJECTED
10:06AM 14 UNDER RULE 26 AND RULE 37 BECAUSE THIS THEORY WAS NEVER
10:06AM 15 DISCLOSED IN THE CASE AS A BASIS FOR INFRINGEMENT.

10:06AM 16 THE FACT THAT IT AROSE ONLY --

10:06AM 17 THE COURT: BECAUSE THAT MAY BE REALLY THE SHORT CUT
10:06AM 18 HERE AS OPPOSED TO A COMPLICATED DAUBERT ANALYSIS. IF THAT
10:07AM 19 WASN'T IDENTIFIED IN THE CONTENTIONS, THEN MAYBE WE ARE JUST
10:07AM 20 DONE.

10:07AM 21 I'M VERY CONCERNED THAT, I MEAN, IF I HAVE TO GO THROUGH
10:07AM 22 THE REPORT AND COMPARE IT TO THE DEPOSITION AND DETERMINE
10:07AM 23 WHETHER A NEW OPINION CAME UP IN THE DEPOSITION WHICH I
10:07AM 24 WOULDN'T ALLOW, I NEED TO -- BUT I DON'T WANT TO HAVE TO
10:07AM 25 REVISIT THIS AFTER GOING THROUGH THIS ANALYSIS ONLY TO HAVE TO

10:07AM 1 COME BACK AND HAVE YOU BRING AN IN LIMINE MOTION UNDER RULE 26.
10:07AM 2 IT'S JUST AN UTTER WASTE OF MY TIME.

10:07AM 3 MR. FERRALL: FAIR ENOUGH. AGREED. AGREED.

10:07AM 4 I CAN ABSOLUTELY REPRESENT, AND I DON'T THINK THERE IS ANY
10:07AM 5 CONTENTION TO THE CONTRARY THAT THERE WAS NO THEORY DISCLOSED
10:07AM 6 IN DISCOVERY ABOUT PARSER CODE COPYING, THERE WAS NO THEORY
10:07AM 7 DISCLOSED IN DISCOVERY ABOUT THIS PARSER BEHAVIOR BEING
10:07AM 8 PROTECTED BY COPYRIGHT. AFTER ALL, IT SOUNDS FROM THE
10:08AM 9 DESCRIPTION THAT IT'S A FUNCTIONAL FEATURE THAT WOULDN'T BE
10:08AM 10 PROTECTED BY COPYRIGHT ANYWAY.

10:08AM 11 THE COURT: THAT'S A DIFFERENT ISSUE.

10:08AM 12 MR. FERRALL: UNDERSTOOD. I'M JUST SAYING IT WAS
10:08AM 13 NEVER IN THIS CASE.

10:08AM 14 THE COURT: WHAT I NEED FROM YOU IS THAT RULE 26
10:08AM 15 ISSUE PRESENTED TO ME NOW SO THAT I CAN -- BECAUSE THAT'S A
10:08AM 16 MUCH MORE STRAIGHTFORWARD ANALYSIS FOR ME.

10:08AM 17 MR. FERRALL: RIGHT.

10:08AM 18 THE COURT: AND IF I CAN -- IF I DISAGREE WITH YOU,
10:08AM 19 OF COURSE, THEN I WOULD HAVE TO COME BACK AND DO THIS. BUT I
10:08AM 20 JUST DON'T WANT TO HAVE YOU LOSE ON THIS AND HAVE YOU GO INTO
10:08AM 21 THE OTHER.

10:08AM 22 MR. FERRALL: UNDERSTOOD, YOUR HONOR.

10:08AM 23 AND I TELL YOU, WE DEBATED WHETHER TO BRING THIS UNDER RULE
10:08AM 24 26, BUT WE THOUGHT, THIS IS DAUBERT, THERE'S MOTIONS IN LIMINE
10:08AM 25 LATER, I WANTED TO KEEP IT PURE ON RULE 702.

10:08AM 1 THE COURT: AND I APPRECIATE THAT, AND I THINK ON
10:08AM 2 THIS ONE ISSUE I MAY ASK EACH OF YOU TO GIVE ME A THREE-PAGE
10:08AM 3 BRIEF ON THE RULE 26 ISSUE. BECAUSE I WOULD LIKE TO BE DONE
10:08AM 4 WITH IT EARLY.

10:08AM 5 AND MR. NELSON, YOU CAN TALK ABOUT IT IN A MINUTE, BUT WE
10:08AM 6 ARE GOING TO GO ON ON THIS.

10:08AM 7 MR. NELSON: I THINK I CAN SHORTCUT IT, YOUR HONOR.

10:09AM 8 THE COURT: OKAY.

10:09AM 9 MR. NELSON: SO YEAH, THERE ISN'T, HE'S NOT GOING TO
10:09AM 10 GO BEYOND HIS REPORT, SO WE DON'T NEED TO DO YOUR HONOR WITH
10:09AM 11 MORE BRIEFING AND ALL THAT KIND OF STUFF. WE ARE NOT ALLEGING
10:09AM 12 THAT THERE WAS PARSER SOURCE CODE COPYING IN THE CASE, SO THAT
10:09AM 13 ISN'T AN ISSUE.

10:09AM 14 AND FRANKLY, THIS PARSER SIMILARITY IN HIS REPORT WHERE IT
10:09AM 15 TALKS ABOUT THE SIMILARITY AND IDENTIFIES WHAT THOSE
10:09AM 16 SIMILARITIES ARE, AGREED IS NOT RELEVANT TO THE COPYRIGHT CASE
10:09AM 17 THAT HAS TO DO WITH THE PATENT CASE AND SOME CONTENTIONS THAT
10:09AM 18 WE TOOK ONLY WHAT WE NEEDED TO TAKE WITH RESPECT TO THE
10:09AM 19 COPYING.

10:09AM 20 SO THAT'S RIGHT, IT'S NOT A COPYRIGHT ISSUE, WE ARE NOT
10:09AM 21 TALKING ABOUT SOURCE CODE COPYING.

10:09AM 22 THE COURT: DOES THAT HAVE TO DO WITH THE HELP
10:09AM 23 DESCRIPTIONS AS WELL?

10:09AM 24 MR. NELSON: WELL, I THINK THE HELP DESCRIPTIONS IS
10:09AM 25 WHAT'S RESOLVED BECAUSE THE ONLY THING WE ARE TALKING ABOUT

10:09AM 1 THERE IS THOSE DESCRIPTIONS WERE FOUND IN THE SOURCE CODE, THEY
10:09AM 2 ARE COPIED IN, BUT THAT'S ALL WE ARE TALKING ABOUT.

10:10AM 3 WE ARE NOT TALKING ABOUT THE ACTUAL, WHAT I WOULD CALL THE
10:10AM 4 LINES OF CODE THAT IMPLEMENT IT, THAT WOULD BE MORE OF AN OUT
10:10AM 5 PUT THAT SAYS HERE IS WHAT YOU PRINT ON THE SCREEN.

10:10AM 6 THE COURT: OKAY. THEN IT LOOKS LIKE YOU ARE
10:10AM 7 SUCCESSFUL HERE, AND THAT'S GOOD.

10:10AM 8 MR. FERRALL: WITH ONE CAVEAT.

10:10AM 9 THE COURT: THANK YOU, MR. NELSON.

10:10AM 10 MR. FERRALL: THANK YOU. AND I APPRECIATE THAT.

10:10AM 11 SO THE ONE THING THAT'S LEFT OF THIS IS IF THIS OPINION
10:10AM 12 THAT ACTUALLY IS IN HIS REPORT ABOUT NONSTANDARD BEHAVIOR IS
10:10AM 13 STILL POTENTIALLY BEING OFFERED, I DO WANT TO TALK ABOUT THE
10:10AM 14 DAUBERT CHALLENGE ON THAT SPECIFICALLY, EVEN IF HE'S NOW
10:10AM 15 REPRESENTED THAT THEY'RE NOT GOING TO MAKE THE LEAP TO SOURCE
10:10AM 16 CODE COPYING.

10:10AM 17 THE COURT: WELL, I DON'T KNOW WHAT THAT'S THEN
10:10AM 18 RELEVANT TO.

10:10AM 19 MR. FERRALL: I'M NOT SURE WHAT IT IS EITHER, BUT
10:10AM 20 MR. NELSON SAID IT'S RELEVANT TO THE PATENT CASE IN SOME WAY,
10:10AM 21 I'VE NEVER SEEN THAT ARGUED AS SUCH.

10:10AM 22 THE COURT: THAT'S WHAT THE 526 DEALS WITH, THAT'S
10:10AM 23 THE SUBJECT MATTER.

10:11AM 24 MR. FERRALL: SO WE COULD MAYBE -- MAYBE WE SHOULD
10:11AM 25 SUBMIT OUR THREE PAGE BRIEF ON RELEVANCE OF THAT. BUT

10:11AM 1 MEANWHILE, WHILE WE ARE HERE, I CAN TALK ABOUT WHY I DON'T
10:11AM 2 THINK THIS -- MR. ALMEROOTH SHOULD BE ABLE TO COME IN AND SAY
10:11AM 3 THIS BEHAVIOR IS NONSTANDARD.

10:11AM 4 THE COURT: SO THE WHOLE CONCEPT HERE, ULTIMATELY
10:11AM 5 THIS IS CIRCUMSTANTIAL EVIDENCE, I THOUGHT IT WAS BEING OFFERED
10:11AM 6 AS CIRCUMSTANTIAL EVIDENCE OF COPYING, I DON'T KNOW WHETHER IT
10:11AM 7 IS, IT'S BEING OFFERED AS CIRCUMSTANTIAL EVIDENCE OF
10:11AM 8 INFRINGEMENT OF THE '526; IS THAT WHERE WE ARE, MR. PAK?

10:11AM 9 MR. PAK: YEAH.

10:11AM 10 SO AS YOUR HONOR KNOWS, COPYING IS AN ELEMENT OF RULE FOR
10:11AM 11 INFRINGEMENT ON THE '526 PATENT. WE KNOW THE '526 PATENT IS
10:11AM 12 SQUARELY FOCUSED ON THE PARSER CODE AS WE HAVE COVERED IT. WE
10:11AM 13 KNOW THE PEOPLE WHO WROTE THIS CODE, YOUR HONOR, WORKED AT
10:11AM 14 CISCO AND HAD ACCESS TO OUR CODE. DR. JAFFE OPINES ON
10:11AM 15 INFRINGEMENT ISSUES UNDER YOUR HONOR'S CLAIM CONSTRUCTION, WE
10:12AM 16 WENT THROUGH THAT, THAT'S BEEN RESOLVED.

10:12AM 17 DR. ALMEROOTH HAS GONE DEEP INTO THE SOURCE CODE FOR LOTS OF
10:12AM 18 OTHER REASONS THAT DEAL WITH HELP DESCRIPTIONS AND OTHER
10:12AM 19 ASPECTS OF THE CASE. HE FOUND SIMILARITY FROM HIS OPINION,
10:12AM 20 HE'S A COMPUTER SCIENTIST, WRITTEN PARSER CODE, HE'S ANALYZED
10:12AM 21 PARSER CODE, HE'S LOOKED AT A LOT OF DIFFERENT TYPES OF
10:12AM 22 PARSING. HE FINDS SUBSTANTIAL SIMILARITY THAT GIVES CREDENCE
10:12AM 23 TO THE WILLFUL INFRINGEMENT ALLEGATIONS IN THE '526 PATENT.

10:12AM 24 THEY ARE MORE THAN HAPPY, AS -- THEY ARE MORE THAN WELCOME
10:12AM 25 TO CROSS-EXAMINE HIM AT TRIAL, AS THEY DID IN HIS DEPOSITION,

1 IF THE JURY FINDS THAT HIS ANALYSIS ISN'T SUFFICIENT OR
2 CREDIBLE, THEN THEY CAN TELL.

3 THE COURT: ALL RIGHT. I CERTAINLY WANT MR. FERRALL
4 TO BE ABLE TO CONTINUE, SO WE ARE GOING TO FOCUS THE REMAINDER
5 OF THIS ARGUMENT REGARDING THE PARSER TREE TO THE '526 PATENT
6 ISSUES IN THE CASE, NOT THE COPYRIGHT ISSUES.

7 MR. FERRALL: WELL, LET ME SAY, YOUR HONOR, THERE'S
8 NEVER BEEN ANY EXPLANATION, I MEAN, THIS IS BRAND-NEW TODAY
9 THAT THIS IS RELEVANT TO THE '526.

10 DR. ALMEROOTH IS NOT EVEN THE EXPERT.

11 THE COURT: IT WASN'T IN THE BRIEFS.

12 MR. FERRALL: IT WAS NOT IN THE BRIEFS AT ALL.

13 THE COURT: SO HE HAS NOT BEEN DISCLOSED AS A WITNESS
14 ON THE '526 ISSUES?

15 MR. FERRALL: NO, THERE'S NOTHING THAT TIES THIS TO
16 THE '526 PATENT. DR. ALMEROOTH IS NOT OFFERING AN OPINION ABOUT
17 THE '526 PATENT, HE DOESN'T OPINE ON INFRINGEMENT.

18 THE COURT: THEN THAT'S AN ISSUE FOR ANOTHER DAY.

19 MR. FERRALL: I WOULD LIKE TO BE ABLE TO SUBMIT -- I
20 WOULD LIKE TO BE ABLE TO ARGUE THAT THIS SHOULDN'T COME IN FOR
21 PURPOSES OF THE '526 PATENT ON GROUNDS OF DISCLOSURE AND
22 OTHERWISE.

23 THE COURT: SO I'M GOING TO HAVE YOU TWO TALK ABOUT
24 THAT.

25 MR. PAK: SURE.

10:13AM 1 THE COURT: BECAUSE IT'S NOT A DAUBERT ISSUE, PER SE,
10:13AM 2 NOW.

10:13AM 3 I THINK THAT THERE IS A CLARITY FROM CISCO AS TO THIS
10:13AM 4 SOURCE CODE COPYING ISSUE THAT IS NOW OFF THE TABLE. SO FOR
10:13AM 5 THE MOTION PRESENTED TO THE COURT, YOU HAVE BEEN SUCCESSFUL AND
10:13AM 6 WE CAN MOVE ON. THERE ARE MANY OTHER ASPECTS TO YOUR MOTION
10:13AM 7 NOW.

10:14AM 8 MR. FERRALL: RIGHT.

10:14AM 9 THE COURT: THIS IS THE ONE YOU DEVOTED MOST OF YOUR
10:14AM 10 BRIEFING TO.

10:14AM 11 MR. FERRALL: AND THIS IS THE MOST IMPORTANT ONE.

10:14AM 12 THE COURT: AND YOU WON.

10:14AM 13 MR. FERRALL: LET ME JUST POINT OUT WHY, LET'S ASSUME
10:14AM 14 THIS, THE BEHAVIORAL ASPECTS OF THE PARSER GETS THROUGH
10:14AM 15 YOUR HONOR'S ASSESSMENT OF ITS RELEVANCE AND APPLICABILITY AND
10:14AM 16 DISCLOSURE FOR THE '526.

10:14AM 17 I JUST WANT TO POINT OUT WHY THIS OPINION, EVEN TO SAY WHY
10:14AM 18 THIS IS NONSTANDARD BEHAVIOR, SHOULDN'T BE ADMITTED UNDER
10:14AM 19 RULE 702.

10:14AM 20 THE COURT: OKAY. THAT'S FINE.

10:14AM 21 AND I REALLY WONDER IF PERHAPS ALL OF THIS NEEDS TO BE THE
10:14AM 22 SUBJECT OF A DIFFERENT MOTION THAT BRINGS IN THE FOCUS OF THE
10:14AM 23 '526, BECAUSE FRANKLY I WAS FOCUSED ON COPYRIGHTABILITY AND ALL
10:14AM 24 OF THOSE ISSUES.

10:14AM 25 MR. FERRALL: SO WAS I.

10:14AM 1 THE COURT: AND I, YOU KNOW, I DON'T PROFESS TO KNOW
10:14AM 2 THESE PAPERS AS WELL AS YOU DO, SO I CAN EASILY ACKNOWLEDGE I
10:14AM 3 MISSED SOMETHING, BUT IT SOUNDS LIKE IT JUST WASN'T THERE TO BE
10:14AM 4 FOUND.

10:15AM 5 I'M NOT SURE THAT I'VE GOT ENOUGH DESCRIPTION OF HOW IT
10:15AM 6 FITS INTO THE '526 FOR YOUR ARGUMENT. I APPRECIATE THAT THE
10:15AM 7 TERM OF NONSTANDARD BEHAVIOR IS PRETTY VAGUE, BUT I DON'T KNOW
10:15AM 8 HOW -- AND THE WITNESS WAS DEPOSED, I DON'T THINK HE REALLY
10:15AM 9 IDENTIFIED WHY IT WAS AN ODDBALL, IN HIS VIEW.

10:15AM 10 MR. FERRALL: NOT AT ALL. AND THAT'S THE PROBLEM,
10:15AM 11 YOUR HONOR.

10:15AM 12 AND THAT'S WHY, I MEAN, WELL, HIS EXPLANATION OF
10:15AM 13 NONSTANDARD IS NONTYPICAL. THAT'S THE EXPLANATION.

10:15AM 14 THE COURT: BUT IT'S NOT SO DIFFERENT THAN WHEN
10:15AM 15 SOMETHING BECOMES A DE FACTO STANDARD. SO YOU BOTH ARE
10:15AM 16 WORKING --

10:15AM 17 MR. FERRALL: IT IS.

10:15AM 18 THE COURT: YES, I KNOW THAT'S YOUR VIEW, BUT TO ME
10:15AM 19 IT'S FEELING A LOT THE SAME.

10:15AM 20 MR. FERRALL: HERE'S THE DISTINCTION, YOUR HONOR.

10:15AM 21 DR. BLACK, MR. SEIFERT REVIEWED THOUSANDS AND THOUSANDS OF
10:15AM 22 MATERIAL, HAVE DATA PRESENTED TO THE COURT AND THE JURY ABOUT
10:16AM 23 THE BASIS FOR ITS OPINION.

10:16AM 24 DR. ALMEROTH DID NOTHING FOR THIS. NOTHING. THERE IS
10:16AM 25 NOTHING DISCLOSED BEHIND THIS OPINION.

1 THE COURT: AND I DON'T QUESTION THAT DR. BLACK AND
2 MR. SEIFERT WENT THROUGH ALL OF THAT PAINSTAKING WORK TO GO
3 THROUGH THE DOCUMENTS. BUT IT'S A LITTLE BIT BESIDE THE POINT
4 BECAUSE WHEN, ULTIMATELY, THEY GIVE ME AN OPINION THAT HAS NO
5 BENCHMARKS IN IT THAT I CAN OBSERVE FOR METHODOLOGY, JUST THE
6 FACT THAT THEY WORKED HARD, I MEAN, I WORKED HARD HERE TOO BUT
7 I'M NOT SURE IT CAME TO ANYTHING.

8 SO THAT'S MY CONCERN AND THAT'S WHERE THIS NON, WHEN IS
9 SOMETHING NOUN STANDARD, WHAT DO I HAVE NONSTANDARD BEHAVIOR.

10 SO I AGREE WITH YOU, THIS MAY NOT COME IN, BUT IT'S NOT
11 UNLIKE THE PROBLEM I IDENTIFIED WITH DR. BLACK. SO YOU KNOW, I
12 NEED TO BE CONSISTENT HERE. YOU ARE RIGHT. I'M LEFT WITH
13 NOTHING HERE. IT'S NONSTANDARD BECAUSE DR. ALMEROTH SAID IT
14 WAS.

15 MR. FERRALL: AND THE DIFFERENCE IS AT LEAST WITH DR.
16 BLACK AND MR. SEIFERT, THERE'S A BODY OF DATA AND A TEST THAT
17 THEY ARTICULATE THAT YOU CAN CRITIQUE. WITH MR. ALMEROTH,
18 THERE IS NO TEST, THERE IS NO DATA, THERE'S NOTHING.

19 THE COURT: THE REASON THAT I MAY PUT THIS OFF IS
20 THAT I NEED TO KNOW EXACTLY WHAT IT'S GOING TO BE OFFERED FOR
21 IN ORDER TO EVALUATE IT.

22 AND IT APPEARS THAT IT'S BEING OFFERED DIFFERENTLY THAN I
23 HAD ASSUMED. AND WHEN CISCO IDENTIFIES THE PURPOSE FOR
24 UTILIZING PARAGRAPH 83 FROM THE REPORT, THEN, I MEAN, THEN YOU
25 HAVE A RULE 26 ISSUE AS WELL.

10:17AM 1 AND I REALLY THINK I CAN GIVE YOU A MORE COMPREHENSIVE
10:17AM 2 DECISION IF WE PUT ALL OF THIS INTO A DIFFERENT MOTION.

10:17AM 3 MR. FERRALL: THEY'RE ENOUGH.

10:18AM 4 THE COURT: SO I THINK I'M GOING TO DEFER ON THIS
10:18AM 5 NONSTANDARD BEHAVIOR ISSUE.

10:18AM 6 OKAY. SO WE ARE DONE WITH THE PARSER SOURCE CODE ISSUE.
10:18AM 7 AND YOU WERE GOING -- IS THAT CORRECT?

10:18AM 8 MR. FERRALL: WE ARE DONE.

10:18AM 9 THE COURT: THEN MOVING ON TO, AND THEN YOU SAID THAT
10:18AM 10 THERE WAS -- THAT YOU'VE WORKED OUT THE HELP DESK ISSUE.

10:18AM 11 MR. FERRALL: RIGHT.

10:18AM 12 AND I THINK MR. NELSON CONFIRMED THAT, THAT WITH REGARD TO
10:18AM 13 THE HELP DESCRIPTIONS, THAT WE WERE CONCERNED, AND THE REASON
10:18AM 14 WE BROUGHT THIS MOTION, IS THAT WE WERE CONCERNED THAT
10:18AM 15 DR. ALMEROTH WAS GOING TO TRANSLATE AN OPINION ABOUT THESE HELP
10:18AM 16 DESCRIPTIONS WHICH ARE STRINGS OF TEXT THAT APPEAR ON THE
10:18AM 17 SCREEN INTO AN OPINION THAT THERE WAS COPYING OF SOURCE CODE.

10:19AM 18 AND WHAT I THINK MR. NELSON AND CISCO CONFIRMED IN THEIR
10:19AM 19 OPPOSITION BRIEF IS THAT NO, THEY ARE NOT MAKING A CONTENTION
10:19AM 20 THAT THERE WAS COPYING OF SOURCE CODE, IT'S JUST AN ARGUMENT
10:19AM 21 THAT THEY SAY THEY POINT TO EVIDENCE THAT THIS STRING OF TEXT
10:19AM 22 APPEARS IN THE ARISTA SOURCE CODE, BUT OF COURSE IT DOES
10:19AM 23 BECAUSE YOU HAVE TO HAVE CODE THAT SAYS PRINT THIS TEXT.

10:19AM 24 SO AS LONG AS THERE'S NOT ANY INSINUATION OF SOURCE CODE
10:19AM 25 COPYING, THEN THAT'S NOT THE SUBJECT, THEN THIS MOTION IS

10:19AM 1 RESOLVED. WE HAVE OTHER PROBLEMS, OF COURSE, BUT THAT RESOLVES
10:19AM 2 THIS MOTION.

10:19AM 3 THE OTHER THING I WANTED TO POINT OUT THAT I THINK IS
10:19AM 4 CONCEDED, HAS TO DO WITH THE LOOK AND FEEL OPINION. AND THERE
10:19AM 5 OUR MOTION, AGAIN, WASN'T TO TRY TO ELIMINATE ANY MENTION OF
10:19AM 6 LOOK AND FEEL ALL TOGETHER, BUT WE WANTED TO MAKE SURE THAT DR.
10:20AM 7 ALMEROTH DIDN'T HAVE A LOOK AND FEEL OPINION THAT EXTENDED
10:20AM 8 BEYOND THE CLI ELEMENTS THAT WE HAVE BEEN SPENDING A
10:20AM 9 YEAR-AND-A-HALF LITIGATING.

10:20AM 10 THE COURT: OKAY.

10:20AM 11 MR. FERRALL: AND THEY HAVE CONCEDED THAT TOO IN
10:20AM 12 THEIR OPPOSITION. SO I THINK THAT TOO IS RESOLVED.

10:20AM 13 THE COURT: AND THAT'S ALL THAT YOU WERE LOOKING FOR
10:20AM 14 THERE.

10:20AM 15 MR. FERRALL: RIGHT. AND WE DID HAVE SOME OTHER
10:20AM 16 PARTS, BUT GIVEN THE TIMING AND GIVEN THE IMPORTANCE OF OTHER
10:20AM 17 ISSUES THAT WE WANT TO RAISE TODAY, I'M GOING TO SUBMIT THE
10:20AM 18 OTHER ISSUES ON THE PAPERS, UNLESS YOUR HONOR HAS QUESTIONS.

10:20AM 19 THE COURT: OKAY.

10:20AM 20 WELL, THE REMAINING ISSUES, WELL, THERE WAS THE COPYING OF
10:20AM 21 THE TECHNICAL DOCUMENTS.

10:20AM 22 MR. FERRALL: RIGHT.

10:20AM 23 THE COURT: DID YOU WANT TO --

10:20AM 24 MR. FERRALL: SURE. THE POINT THERE IS SIMPLY THAT
10:20AM 25 DR. ALMEROTH DOESN'T OFFER ANY ACTUAL EXPERT TESTIMONY ON IT.

1 AND IT'S INTERESTING BECAUSE DR. ALMEROTH THERE, HE CLAIMS
2 EXPERTISE IN DETECTING PLAGIARISM. HE TALKS ABOUT A PROGRAM
3 THAT HE'S DEVELOPED FOR DETECTING PLAGIARISM. BUT HE DIDN'T
4 USE THIS PROGRAM, HE DIDN'T USE THIS TOOL, HE DIDN'T USE ANY
5 TOOL. HE DOESN'T DO ANYTHING OTHER THAN LOOK AT SIMILARITY AND
6 TEXT AND CONCLUDE THAT THERE WAS COPYING. AND THAT SEEMS LIKE
7 THE JURY CAN DO THAT AS EASILY AS DR. ALMEROTH.

8 THE COURT: WELL, YOU KNOW, THAT WAS YOUR ARGUMENT,
9 IT WAS REALLY A LAY COMPARISON. I AM -- IN THE CONTEXT OF A
10 CASE OF THIS COMPLEXITY, I THINK THAT PLACES TOO MUCH OF A
11 BURDEN ON A JURY.

12 YOU KNOW, YOU ARE GOING TO LINE THE WALLS OF THIS COURTROOM
13 WITH EXHIBITS OR FILL UP A LOT OF THUMB DRIVES WITH DOCUMENTS.

14 AND SO PUTTING -- WHEN AN EXPERT CAN COME IN AND WALK THE
15 JURY THROUGH IT, I THINK THAT IS -- I THINK I'M MORE WILLING TO
16 LET AN EXPERT DO THAT.

17 YOU DON'T SUGGEST THAT WHAT HE'S DOING IS INCORRECT, YOU
18 JUST SAY WE DON'T NEED AN EXPERT. I THINK MY DISCRETION THERE
19 IS PRETTY BROAD AS TO WHETHER I WILL ALLOW HIM TO DO THAT. I
20 WAS INCLINED TO DENY THAT PORTION AND LET HIM WALK THROUGH HIS
21 COMPARISON, THEN YOU CAN CROSS-EXAMINE HIM ON THAT.

22 THE OTHER ISSUES WERE SUMMARIZING FACTS AND THE VOUCHING.
23 AND ON THOSE, I AM REALLY JUST GOING TO DEFER ANY RULING
24 BECAUSE CISCO IS ON NOTICE, IF THEY ASK THE QUESTION IN THE
25 WRONG WAY, I WANT YOU TO OBJECT. I WOULD CERTAINLY SUSTAIN A

10:22AM 1 PROPER OBJECTION THERE, BUT I CAN'T -- IT'S TOO GENERAL AN
10:22AM 2 OBJECTION FOR ME TO SUSTAIN NOW.

10:22AM 3 MR. FERRALL: FAIR ENOUGH. AND I THINK BOTH PARTIES
10:22AM 4 AGREED ON THAT ISSUE ABOUT VOUCHING AND SUBJECTIVE --

10:22AM 5 THE COURT: I THINK SO.

10:22AM 6 MR. FERRALL: RIGHT.

10:22AM 7 THE COURT: OKAY. NOW, MR. PAK, IS THERE MORE THAT
10:22AM 8 YOU WANT TO ADDRESS ON THIS OR ACTUALLY HAVE WE WORKED ALL THIS
10:22AM 9 OUT?

10:22AM 10 MR. PAK: NO, I THINK WE WOULD LIKE TO MOVE ON TO THE
10:23AM 11 DAMAGES SIDE OF THE CASE, YOUR HONOR, AT THIS POINT.

10:23AM 12 THE COURT: OKAY. SO, LET'S SEE, SO I'M GOING TO
10:23AM 13 HAVE DR. CLARK ON THE PATENT AND THEN THE DAMAGES.

10:23AM 14 MR. PAK: YES. WE COULD ACTUALLY HAVE DR. CLARK'S
10:23AM 15 ISSUE INVOLVED NOW IF YOU WOULD LIKE.

10:23AM 16 THE COURT: I WAS ACTUALLY LOOKING WHETHER TO SEE IF
10:23AM 17 THIS WOULD BE A GOOD TIME TO TAKE A BREAK, BECAUSE IT'S PRETTY
10:23AM 18 DENSE STUFF.

10:23AM 19 MR. PAK: ABSOLUTELY. THANK YOU VERY MUCH.

10:23AM 20 THE COURT: OKAY. ALL RIGHT. LET'S JUST TAKE A
10:23AM 21 TEN-MINUTE BREAK AND THEN WE WILL DO THE REMAINING.

10:23AM 22 (WHEREUPON A RECESS WAS TAKEN.)

10:32AM 23 THE COURT: WHICH MOTION ARE WE GOING TO MOVE ON TO,
10:32AM 24 MR. PAK?

10:32AM 25 MR. PAK: YOUR HONOR, ACTUALLY GIVEN THE LIMITED

10:32AM 1 AMOUNT OF TIME, WE THOUGHT WE WOULD START WITH DR.

10:32AM 2 ELSTEN'S MOTION.

10:32AM 3 THE COURT: OKAY. GREAT.

10:33AM 4 MR. PAK: AND WE CAN GO OVER SOME OF THE DAMAGES
10:33AM 5 QUESTIONS THAT YOUR HONOR MENTIONED.

10:33AM 6 THE COURT: AND LET ME JUST CHANGE MY MIND SET HERE.

10:33AM 7 SO DR. ELSTEN'S OPINIONS HAVE TO DO WITH THE TEST FOR
10:33AM 8 DISGORGEMENT; IS IT LIMITED TO THAT?

10:33AM 9 MR. PAK: THE OPINIONS THAT WE ARE CHALLENGING,
10:33AM 10 YOUR HONOR, TODAY, AT LEAST THE FOCUS OF MY ARGUMENTS WILL BE
10:33AM 11 FOCUSED ON THE DISGORGEMENT ANALYSIS ISSUE.

10:33AM 12 THE COURT: OKAY. SO THAT IS ONLY A BENCH ISSUE,
10:33AM 13 ISN'T IT?

10:33AM 14 MR. PAK: IT IS NOT, YOUR HONOR.

10:33AM 15 SO IF YOUR HONOR WOULD LIKE SEPARATE BRIEFING ON THAT,
10:33AM 16 BECAUSE THIS WAS REALLY RAISED IN THE CONTEXT OF A DAUBERT, BUT
10:33AM 17 I CAN GIVE YOU NINTH CIRCUIT CASES THAT HAVE DEALT WITH
10:33AM 18 DISGORGEMENT OF PROFITS WHERE THE JURY WAS PROVIDED
10:33AM 19 INSTRUCTIONS AND THERE WAS A FINDING OF JURY VERDICT. SO THIS
10:33AM 20 IS THE THREE BOYS MUSIC CORPORATION CASE. THIS IS THE *LOVE IS*
10:33AM 21 *A WONDERFUL THING* BY MICHAEL BOLTON, WAS THE SONG AT ISSUE IN
10:34AM 22 THAT CASE. AND THERE WAS A -- I DON'T KNOW IF YOUR HONOR
10:34AM 23 REMEMBERS, BUT THE ISLEY BROTHERS HAD THEIR VERSION IN THE 70'S
10:34AM 24 AND MICHAEL BOLTON CAME IN, DID HIS RENDITION IN THE 80'S.

10:34AM 25 THE COURT: I'M WITH YOU ON THOSE.

10:34AM 1 MR. PAK: SO WHAT HAPPENED IN THAT CASE, YOUR HONOR,
10:34AM 2 WAS THE JURY WAS INSTRUCTED ON THE BURDEN SHIFTING UNDER
10:34AM 3 504(B). THE DAMAGES EXPERT, JUST THE SAME FRAMEWORK WE ARE
10:34AM 4 LAYING OUT HERE.

10:34AM 5 THE COURT: OKAY. AND THAT WAS RAISED IN THE ARISTA
10:34AM 6 BRIEF. AND SO I WANTED TO -- SO LET'S MOVE ON.

10:34AM 7 MR. PAK: IF YOUR HONOR WANTS BRIEFING ON THAT, WE
10:34AM 8 CAN ABSOLUTELY GIVE YOU LOTS OF NINTH CIRCUIT CASES ON THAT.

10:34AM 9 THE COURT: NO, YOU HAVE GIVEN ME ENOUGH BRIEFING.

10:34AM 10 MR. PAK: ALL RIGHT.

10:34AM 11 THE COURT: SO THE FIRST THING IS GETTING THE PROPER
10:34AM 12 TEST.

10:34AM 13 MR. PAK: YES.

10:34AM 14 THE COURT: AND SO, THAT HAS TO DO WITH, SO I'M GOING
10:35AM 15 TO HAVE TO ACTUALLY DETERMINE THE LEGAL STANDARD SO THAT I CAN
10:35AM 16 EVALUATE DR. ELSTEN'S OPINION.

10:35AM 17 MR. PAK: CORRECT.

10:35AM 18 THE COURT: BECAUSE IF SHE DIDN'T APPLY -- THAT'S
10:35AM 19 WHAT YOU ARE ARGUING, ISN'T IT?

10:35AM 20 MR. PAK: THAT'S RIGHT, YOUR HONOR.

10:35AM 21 SO THERE ARE TWO ISSUES GOING ON, YOUR HONOR. AND I THINK
10:35AM 22 THERE'S AN OVERALL ISSUE WITH RESPECT TO THE FRAMEWORK OF HOW
10:35AM 23 DISGORGEMENT SHOULD BE PRESENTED TO THE JURY, AND THAT'S AN
10:35AM 24 ISSUE THAT TOUCHES UPON DOCTOR ELSTEN, BUT IT ALSO TOUCHES
10:35AM 25 ABOUT DR. CHEVALIER.

10:35AM 1 THE COURT: SURE.

10:35AM 2 MR. PAK: AND WE MADE IT VERY CLEAR OUR POSITION,
10:35AM 3 WHICH TRACKS JUDGE ALSUP'S ORDER IN THE ORACLE V. GOOGLE CASE,
10:35AM 4 TRACKS THE NINTH CIRCUIT CASE LAW FROM THREE BOYS CORPORATION,
10:35AM 5 HARPER'S ROW FROM THE SUPREME COURT, AND THAT IS IN COPYRIGHT
10:35AM 6 LAW, THE ISSUE OF DISGORGEMENT OF PROFITS, THE BURDEN RESIDES
10:35AM 7 WITH THE DEFENDANT.

10:35AM 8 THE COURT: TO APPORTION.

10:36AM 9 THE WITNESS: TO APPORTION.

10:36AM 10 THE COURT: I DON'T THINK THAT'S DISPUTED.

10:36AM 11 MR. PAK: IT'S A LITTLE BIT OF A DISPUTE IN THE
10:36AM 12 CHEVALIER MOTIONS.

10:36AM 13 THE COURT: THE ISSUE WAS CAUSAL NEXUS.

10:36AM 14 MR. PAK: THERE'S CAUSAL NEXUS --

10:36AM 15 THE COURT: AND YOU DON'T DISAGREE? YOUR REPLY BRIEF
10:36AM 16 YOU ACKNOWLEDGE.

10:36AM 17 MR. PAK: WE HAVE A CAUSAL NEXUS BURDEN, HOWEVER IN
10:36AM 18 THE CASE OF DIRECT PROFITS, SO THIS IS A VERY DIFFERENT CASE
10:36AM 19 THAN THE ORACLE V. GOOGLE CASE. DIRECT PROFITS IS A DIFFERENT
10:36AM 20 CASE THAN THE INDIRECT PROFITS AT ISSUE IN THE ORACLE V. GOOGLE
10:36AM 21 CASE.

10:36AM 22 IF YOU RECALL IN THE ORACLE V. GOOGLE, GOOGLE DOESN'T MAKE
10:36AM 23 MONEY WILL SELLING ANDROID. THEY DERIVE INDIRECT PROFITS BY
10:36AM 24 SELLING ADVERTISING, SEARCH ENGINE REVENUES AND SO FORTH.

10:36AM 25 IN THIS CASE, WE ARE TALKING ABOUT DIRECT PROFITS THAT

1 ARISTA MAKES BY SELLING THE EOS OPERATING SYSTEM WHICH IS
2 EMBODIED IN THEIR NETWORKING EQUIPMENT. SO THE PRODUCTS THAT
3 EMBODY THE COPYRIGHTED WORK, IS GENERATING THE REVENUE.

4 AND THE NINTH CIRCUIT LAW IS VERY CLEAR ON THIS, AND I
5 DON'T THINK THIS IS A CONTESTED POINT, THAT WE CAN DISCHARGE
6 OUR CAUSAL NEXUS BURDEN BY SHOWING REVENUES THAT ARE DIRECTLY
7 ATTRIBUTABLE TO THE PRODUCTS THAT EMBODY THE COPYRIGHT.

8 THE COURT: SO I LOOKED AT THE POLAR BEAR CASE, AND
9 FOOTNOTE 7 THAT I BELIEVE ARISTA POINTED OUT TO ME, AND IT
10 SEEMS TO INDICATE THAT SECTION 504 DOESN'T ACTUALLY DISTINGUISH
11 BETWEEN DIRECT AND INDIRECT PROFITS AND DOES REQUIRE A SHOWING
12 OF CAUSAL NEXUS. AND JUDGE MCCUNE IN POLAR BEAR, THEN IN
13 FOOTNOTE 7 SEEMS TO REJECT THE IDEA THAT NO CAUSAL NEXUS NEED
14 BE SHOWN BY THE PLAINTIFF.

15 MR. PAK: YOUR HONOR, THAT'S ALL TRUE, BUT THEN WHAT
16 YOU HAVE TO DO IS LOOK AT ALL THE CASE LAW IN THE NINTH CIRCUIT
17 THAT APPLIES POLAR BEAR, THAT APPLIES 504(B). AND WHEN IT
18 COMES TO DIRECT PROFITS, THE NINTH CIRCUIT CASES HAVE ALL
19 INDICATED THAT THE PLAINTIFF DISCHARGES THE CAUSAL NEXUS BURDEN
20 BY SHOWING THAT THE REVENUES GENERATED ARE REVENUES GENERATED
21 DIRECTLY FROM THE SALE OF THE PRODUCTS THAT EMBODY THE
22 COPYRIGHTED WORKS.

23 AND THOSE ARE ALL THE CASES WE CITED YOUR HONOR IN THE
24 CAUSAL NEXUS CASES

25 SO AS A BROAD PRINCIPLE, YES, THE CAUSAL NEXUS IS A LEGAL

1 BURDEN THAT IS ON THE PLAINTIFF. BUT IN DISCHARGING THAT
2 BURDEN, THIS IS THE BROCADE COMMUNICATIONS V. A10 NETWORKS
3 CASE, TO RECOVER DISGORGEMENT OF DIRECT PROFITS, A PLAINTIFF
4 MAY SATISFY AS A CAUSAL LINK REQUIREMENT BY SHOWING THE GROSS
5 REVENUES FROM THE INFRINGING PRODUCT.

6 THE COURT: OKAY.

7 MR. PAK: THAT'S THE REASON WHY ALL THIS OTHER CASE
8 LAW ABOUT INDIRECT PROFITS IS REALLY NOT APPLICABLE TO THIS
9 CASE. WE ARE ONLY SEEKING DIRECT PROFITS FROM THE SALE OF
10 PRODUCTS.

11 SO WITH THAT YOUR HONOR, LET ME FOCUS YOUR HONOR'S
12 ATTENTION ON THE SPECIFIC METHODOLOGY ISSUE THAT WE HAVE WITH
13 DR. ELSTEN IN OUR DISGORGEMENT OF PROFITS ANALYSIS.

14 IF YOU LOOK AT OUR PRESENTATION SLIDE 2, AND I BELIEVE
15 YOUR HONOR IS VERY FAMILIAR WITH THIS CASE LAW IN THE CONTEXT
16 OF THE FINJAN CASE THAT YOUR HONOR DEALT WITH WHERE YOU HAVE
17 VERY IMPORTANT CASE LAW THAT LOOKED AT THE QUESTION OF
18 APPORTIONMENT.

19 CERTAINLY IN THAT CASE IT WAS APPORTIONMENT OF PATENT
20 DAMAGES, BUT WE THINK THE LEGAL PRINCIPLES APPLY HERE AS WELL
21 FROM A METHODOLOGY STANDPOINT, WHICH IS, IS IT PERMISSIBLE FOR
22 AN EXPERT TO COME IN AND SIMPLY COUNT THE NUMBER OF FEATURES IN
23 A PRODUCT AND THEN DO A DIVISION WITH THE DENOMINATOR BEING THE
24 NUMBER OF FEATURES IN ORDER TO ARRIVE AT A VALUATION OPINION.

25 THE COURT: SO YOU DO KNOW THAT IN THE FINJAN TRIAL I

1 ALLOWED THAT EVIDENCE TO COME IN AND THE EXPERT DID TESTIFY
2 THAT OF THE 24 ELEMENTS, SHE JUST COUNTED THEM, AND THAT'S WHAT
3 WENT TO THE JURY.

4 MR. PAK: THAT'S RIGHT, YOUR HONOR.

5 BUT YOUR HONOR ALSO NOTED VERY IMPORTANTLY THAT THE KEY
6 ISSUE IS THE FOUNDATION OF FACTS QUESTION.

7 AND WHAT YOUR HONOR FOUND IN THAT CASE IS THERE WAS AT
8 LEAST A DISPUTED FACT AS TO WHETHER FOUNDATIONAL FACTS COULD BE
9 LAID PROPERLY AT TRIAL, AND YOUR HONOR ALLOWED THAT ISSUE TO GO
10 TO TRIAL.

11 HERE, WE HAVE A VERY DIFFERENT SITUATION. THIS IS SLIDE 4,
12 OF OUR PRESENTATION. WE DEPOSED DR. ELSTEN. BECAUSE SHE DOES
13 NO ANALYSIS WHATSOEVER INTO THE FOUNDATIONAL FACTS. AND THE
14 FOUNDATIONAL FACTS HERE ARE THE RELATIVE VALUATION, AND THIS IS
15 THE FRANK MUSIC CASE WE CITED YOUR HONOR FROM THE
16 NINTH CIRCUIT, QUANTITATIVE ANALYSIS ALONE ISN'T SUFFICIENT,
17 YOU HAVE TO LOOK AT THE QUALITATIVE ASSESSMENT OF, ARE THESE
18 FEATURES -- SOME OF THESE FEATURES MORE VALUABLE THAN OTHER
19 FEATURES?

20 BECAUSE I COULD HAVE A LIST OF A HUNDRED FEATURES AND I
21 JUST DO A DIVISION BY 100 AND IT'S NOT GOING TO SUPPORT A
22 FINDING OF VALUATION OF ONE PERCENT.

23 SO HERE WE SAW NO ANALYSIS IN HER REPORT THAT EVEN
24 ATTEMPTED TO DO A VALUATION OF THESE FEATURES RELATIVE TO EACH
25 OTHER.

1 AND IN FACT, WHEN SHE WAS ASKED THIS QUESTION IN HER
2 DEPOSITION, PAGE 213, IN DOING THOSE CALCULATIONS IN TABLE 13,
3 TABLE 13 SUMMARIZES ALL OF OUR EVIDENCE WITH RESPECT TO THIS
4 ISSUE OF THE VALUATION ON 12.5 PERCENT, WE ASKED HER, YOU HAVE
5 TREATED EACH OF THESE FEATURES IN THE TOTAL FEATURES
6 CALCULATIONS AS BEING OF EQUAL WEIGHT; IS THAT CORRECT? YES.

7 AND THIS IS THE KEY IMPORTANT ISSUE, YOU HAVE NOT ATTEMPTED
8 TO ASCERTAIN WHETHER ANY OF THESE FEATURES SHOULD BE GIVEN MORE
9 OR LESS WEIGHT THAN THE OTHER FEATURES; IS THAT CORRECT? NOT
10 FOR THE PURPOSE OF THIS CALCULATION.

11 THAT IS A DISPOSITIVE ADMISSION THAT THIS EXPERT SIMPLY
12 COUNTED THE FEATURES FOR THE PURPOSE OF ARRIVING AT
13 12.5 PERCENT WITHOUT EVEN LOOKING INTO THE FOUNDATIONAL FACTS.

14 AND WE COULD EVEN ANALOGIZE THIS CASE, YOUR HONOR, TO -- AS
15 YOUR HONOR KNOWS IN PATENT CASES, WE DO ENGAGE IN SURVEYS, WE
16 DO LOOK INTO OTHER METHODOLOGIES THAT HAVE BEEN WELL APPROVED
17 BY THE FEDERAL CIRCUIT AND THE NINTH CIRCUIT FOR ASCERTAINING
18 VALUATION, NOT SIMPLY COUNTING UP FEATURES.

19 THEY COULD HAVE DONE CUSTOMER SURVEYS TO UNDERSTAND WHERE
20 DOES CLI RANK. AND I THINK MR. NELSON PUT IT APTLY, WHICH IS,
21 WE DON'T KNOW THE ANSWER TO THE QUESTION OF IF YOU TOOK THE
22 CISCO CLI OUT, WOULD ANY OF THESE SALES FROM ARISTA HAVE TAKEN
23 PLACE OR SALES OF OTHER COMPARABLE PRODUCTS IN THE MARKETPLACE.

24 THAT QUESTION WAS NEVER ANSWERED. AND I DEPOSED MR. SADANA
25 WHO WAS THEIR SENIOR VICE PRESIDENT, THEIR 30(B)(6) DEPONENT ON

10:42AM 1 DAMAGES, I ASKED HIM SPECIFICALLY, HOW ARE THESE DECISIONS
10:42AM 2 BEING MADE BY CUSTOMERS? DO YOU HAVE ANY VISIBILITY?

10:42AM 3 AND HE SAYS, IN TERMS OF THE RELATIVE RANKINGS OF ALL THE
10:42AM 4 DIFFERENT FEATURES, IT'S A BLACK BOX. WE DON'T KNOW. THEY
10:42AM 5 DON'T TELL US. THEY MAY TELL US CERTAIN FEATURES THAT MAYBE --

10:42AM 6 THE COURT: SO THE SWITCHES ARE NOT CUSTOM SWITCHES?

10:42AM 7 MR. PAK: THEY ARE NOT CUSTOM SWITCHES.

10:42AM 8 SO THESE ARE, FOR THE MOST PART -- THERE ARE CERTAIN CUSTOM
10:42AM 9 SWITCHES WHERE, FOR EXAMPLE, EARLY ON IN THE PROCESS THEY MAY
10:42AM 10 GET SOME FEEDBACK FROM CUSTOMERS.

10:43AM 11 THE COURT: SO THERE ISN'T AN RFQ OR ANYTHING LIKE
10:43AM 12 THAT.

10:43AM 13 MR. PAK: THERE'S AN RFP, IN THE SENSE THAT THEY ARE
10:43AM 14 LOOKING FOR CERTAIN TYPES OF FEATURES THAT THEY WANT TO SEE
10:43AM 15 WHETHER YOUR COMMODITY SWITCHES MEET THOSE REQUIREMENTS AND
10:43AM 16 THERE MAY BE NEGOTIATION AROUND PRICE.

10:43AM 17 BUT THIS IS NOT A SITUATION WHERE ARISTA IS BUILDING A
10:43AM 18 SPECIFIC SWITCH FOR GOOGLE OR A SPECIFIC SWITCH FOR FACEBOOK.
10:43AM 19 THEY MAY BE ASKED TO COMPETE FOR BIDS, BUT THEY ARE ALWAYS
10:43AM 20 USING THEIR GENERIC --

10:43AM 21 THE COURT: SO THEY IDENTIFY THE GENERAL FEATURES THE
10:43AM 22 GENERIC SWITCH HAS.

10:43AM 23 MR. PAK: THAT'S RIGHT.

10:43AM 24 THE COURT: OKAY.

10:43AM 25 MR. PAK: SO I ASKED THEM, HOW CAN YOU TELL WHAT WAS

10:43AM 1 IMPORTANT TO A PARTICULAR CUSTOMER?

10:43AM 2 AND HE SAYS, I DON'T KNOW THE ANSWER TO THAT QUESTION, NO
10:43AM 3 ONE KNOWS THE ANSWER TO THAT QUESTION, IT'S SUBJECTIVE,
10:43AM 4 INDIVIDUALIZED, MANY OF THE CUSTOMERS WON'T EVEN TELL YOU WHY
10:43AM 5 THEY SELECTED A PRODUCT.

10:43AM 6 NOW, THEY DO PICK -- ARISTA DOES CHERRY PICK SOME DOCUMENTS
10:43AM 7 WHERE ARISTA CUSTOMERS HAVE SAID, YOU KNOW, I LIKE THAT
10:43AM 8 FEATURE, YOU KNOW, I LIKE THE FACT THAT YOU HAVE LOW LATENCY,
10:43AM 9 BUT I LIKE THE FACT THAT YOU CAN RECONFIGURE.

10:44AM 10 BUT THAT DOESN'T TELL US ANYTHING ABOUT THE RELATIVE
10:44AM 11 RANKING OF THESE FEATURES WHATSOEVER, BECAUSE THE PROBLEM WE
10:44AM 12 ARE HAVING, YOUR HONOR, IS OUR BELIEF IS THEY COPIED OUR CLI TO
10:44AM 13 A LARGE EXTENT, SO WHEN YOU HAVE TWO PRODUCTS WITH THE SAME
10:44AM 14 CLI, LOOK AND FEEL TO THE USER, WHY WOULD THE CUSTOMER TELL YOU
10:44AM 15 THAT THE CLI WAS AN IMPORTANT DIFFERENTIATOR?

10:44AM 16 THE COURT: RIGHT.

10:44AM 17 MR. PAK: THEY WOULDN'T. THAT'S THE POINT. THAT'S
10:44AM 18 THE BARRIER TO ENTRY.

10:44AM 19 IF YOU WERE ASKED THE QUESTION, IF I WERE TO TAKE AWAY THAT
10:44AM 20 FEATURE, THAT CLI FEATURE, WOULD YOU HAVE EVEN CONSIDERED ANY
10:44AM 21 OF THE OTHER FEATURES?

10:44AM 22 AND MR. SADANA SAYS, I DON'T KNOW THE ANSWER TO THAT
10:44AM 23 QUESTION WITH CERTAINTY, BUT I KNOW THAT FROM ARISTA'S
10:44AM 24 PERSPECTIVE, HAVING A CISCO-LIKE CLI WAS A BARRIER TO ENTRY
10:44AM 25 INTO THE MARKETPLACE.

1 NONE OF THAT IS REFLECTED, YOUR HONOR, IN DR. ELSTEN'S
2 APPORTIONMENT METHODOLOGY WHERE SHE TAKES JUST ONE DOCUMENT OUT
3 OF MANY, FINDS THAT THERE'S ONE DOCUMENT THAT HAD EIGHT
4 FEATURES, OTHERS OTHER DOCUMENTS HAD FIVE, OTHER DOCUMENTS HAD
5 10, 12, FEATURES, AND THESE SWITCHES HAVE MANY, MANY FEATURES,
6 ALL OF THEM HAVE DOZENS, HUNDREDS OF FEATURES.

7 SHE SELECTS ONE DOCUMENT AND SAYS, WELL, THIS DOCUMENT HAS
8 EIGHT FEATURES. SO I'M GOING TO TAKE CLI, WHICH IS ONE OF THE
9 LISTED FEATURES, DIVIDE IT BY EIGHT TO GET TO 12.5.

10 SHE DOES NO FURTHER ANALYSIS AT ALL. NO FOUNDATIONAL FACTS
11 INQUIRY INTO WHETHER THESE FACTORS WOULD HAVE BEEN TREATED
12 EQUALLY OR WHETHER ANY ONE OF THEM SHOULD BE GIVEN RANKING OR
13 NOT.

14 SO YOUR HONOR IS ABSOLUTELY CORRECT IN THE FINJAN CASE TO
15 NOTE THE IMPORTANT PRECEDENT IN THIS DISTRICT, THE STRAGENT
16 CASE, THE GOOD TECH CASE WHICH IS A NORTHERN CALIFORNIA CASE
17 ABOUT NOT ALLOWING EXPERTS TO COME IN WITH THIS TYPE OF
18 METHODOLOGY UNLESS THERE'S FOUNDATIONAL FACTS.

19 THE DIFFERENCE HERE BETWEEN THIS CASE AND THE FINJAN CASE
20 IS THE FINJAN CASE THEY HAD DR. MEDVIDOVIC AND DR. LAYNE-FARRAR
21 THAT WENT INTO SOME OF THAT.

22 THIS IS NOT THAT CASE. THIS IS VERY CLEAR THAT SHE MADE NO
23 ATTEMPT, AND IN FACT, IT WOULD HAVE BEEN VERY DIFFICULT TO DO
24 THAT ON THE FACTUAL RECORD.

25 SO TO US, THIS IS A CLEAR CUT ISSUE. WE DON'T THINK SHE'S

1 GOT ANY BASIS TO DO ANY RELATIVE RANKING. TO THE EXTENT THEY
2 ARE COMING IN AND SAYING THERE'S SOME DOCUMENTS THAT SHOW
3 RELATIVE VALUATION BECAUSE THE FEATURE WAS MENTIONED OR NOT,
4 THAT THAT IS NOT PROBATIVE AT ALL TO THE INTERNAL RANKING
5 WITHIN A CUSTOMER. AND THE BURDEN HERE, AGAIN, IS ON THEM.

6 THE COURT: YEAH.

7 MR. PAK: THEY SHOULD HAVE DONE THE SURVEY, THEY
8 SHOULD HAVE GOTTEN CUSTOMER DISCOVERY IF THEY WANTED TO PROVIDE
9 THIS TYPE OF EVIDENCE.

10 I WILL JUST REMIND YOUR HONOR THAT THE FRANK MUSIC CASE AND
11 THE HARPER ROW CASE IS VERY CLEAR WHY WE HAVE THIS LAW OF
12 BURDEN SHIFTING. WHEN YOU COMINGLE INFRINGING WITH NON
13 INFRINGING CONTRIBUTIONS IN A COPYRIGHTED WORK, THE ACCUSED
14 INFRINGER BEARS THE BURDEN THAT IF THEY ARE SUED ON THAT
15 COPYRIGHT INFRINGEMENT, THEY HAVE TO HAVE A CLEAR AND SOUND
16 METHODOLOGY FOR PROVING UP PROFITS WITH RESPECT TO THEIR
17 CONTRIBUTIONS.

18 IT'S A POLICY DECISION THAT'S BEEN CODIFIED INTO STATUTE.
19 IT'S BEEN WELL ADOPTED AND ENDORSED BY ALL THE COURTS LOOKING
20 AT THIS ISSUE, AND THIS TYPE OF METHODOLOGY, AS A METHODOLOGY
21 ISSUE, NOT A FACTUAL ISSUE, IS FUNDAMENTALLY FLAWED,
22 YOUR HONOR. THAT'S WHY WE ASK DR. ELSTEN'S DISGORGEMENT
23 OPINIONS BE STRUCK.

24 THE COURT: SO LET ME JUST ASK YOU BASED ON -- OF
25 COURSE IN FINJAN I ALLOWED FINJAN THE OPPORTUNITY TO LAY THAT

1 FOUNDATION, WHY SHOULDN'T I DO THE SAME THING HERE?

2 MR. PAK: BECAUSE YOUR HONOR, SHE HASN'T DONE THAT.

3 SO IN THAT CASE DR. FERRAR RELIED ON DR. MEDVIDOVIC WHO WAS
4 A SEPARATE TECHNICAL EXPERT WHO LOOKED AT VALUATION OF
5 TECHNOLOGIES, AND I THINK YOUR HONOR HAD SOME CONCERNS ABOUT
6 HIS OPINIONS AS WELL, BUT AT LEAST THERE WAS AN OPPORTUNITY FOR
7 DR. FARRAR TO SAY, I DIDN'T DO THE RELATIVE RANKING MYSELF BUT
8 SOMEBODY ELSE DID, AND I TOOK THAT INTO CONSIDERATION IN COMING
9 UP WITH MY OPINION THAT THESE SHOULD BE EQUALLY VALUED.

10 AND IN THAT CASE IT WAS A MULTI-FACETTED SECURITY PRODUCT,
11 YOUR HONOR HEARD ABOUT THIS DEFENSE IN DEPTH, EVERY ONE OF
12 THOSE FEATURES IS IMPORTANT WHEN PROVIDING SECURITY. IF I
13 DON'T HAVE A FIREWALL, MY OTHER SECURITY FEATURE IS NOT GOING
14 TO HELP ME VERY MUCH.

15 SO FROM A SECURITY VENDOR'S PERSPECTIVE, IT MAY BE A
16 REASONABLE ASSUMPTION THAT THOSE FEATURES SHOULD BE RANKED
17 EQUALLY.

18 HERE, VERY DIFFERENT. WE ARE TALKING ABOUT HIGHLY
19 SOPHISTICATED CONSUMERS WHO HAVE DIFFERENT NEEDS, WHETHER YOU
20 ARE TALKING ABOUT CLOUD NETWORKING VERSUS YOU ARE TALKING ABOUT
21 ENTERPRISE CUSTOMERS, EACH OF THESE CUSTOMERS ARE MAKING
22 INDIVIDUALIZED DECISIONS.

23 SHE MADE NO ATTEMPT TO GO INTO ANY OF THAT AND SHE JUST --

24 THE COURT: AND SHE DOESN'T RELY ON MR. SEIFERT.

25 MR. PAK: NO, NOT AT THIS POINT AT ALL.

10:48AM 1 SO HER OPINION SORT OF PARALLELS MR. SEIFERT'S ANALYSIS
10:48AM 2 WITH RESPECT TO THE MARKET IMPACT, BUT HE DID NO RELATIVE
10:48AM 3 EVALUATION OF ANY OF THESE FACTORS.

10:48AM 4 HE TESTIFIED THAT HE WAS AN EXPERT IN THOSE MATTERS FOR THE
10:48AM 5 PURPOSE OF THIS CASE. HE DOESN'T FRANKLY EVEN UNDERSTAND THE
10:48AM 6 SWITCHES AT ISSUE AND HE WAS NOT ASKED TO DO THAT. HIS
10:49AM 7 OPINIONS ARE REALLY LOOKING AT THIS QUESTION OF DE FACTO
10:49AM 8 INDUSTRY STANDARD AND THEN THE MARKET IMPACT ANALYSIS WE TALKED
10:49AM 9 ABOUT.

10:49AM 10 BUT NO TECHNICAL EXPERT THAT SHE'S RELYING ON FOR THIS
10:49AM 11 CALCULATION HAS DONE THIS KIND OF RELATIVE RISK RANKING
10:49AM 12 FEATURES.

10:49AM 13 WHAT I EXPECT THE OTHER SIDE TO SAY IS WELL, WE HAVE
10:49AM 14 EVIDENCE SHOWING THIS PARTICULAR FEATURE WAS MENTIONED. THAT'S
10:49AM 15 NOT THE POINT. THE POINT ISN'T WHAT THEY TOLD ARISTA OR CISCO
10:49AM 16 AS BEING ONE OF THE FEATURES THAT THEY USED AS A CRITERIA. THE
10:49AM 17 QUESTION IS HOW DO THEY RANK RELATIVELY, AND MORE IMPORTANTLY,
10:49AM 18 WHERE DOES THE CLI RANK INTERNALLY, WOULD THEY HAVE EVEN BOUGHT
10:49AM 19 THE PRODUCT WITHOUT A CISCO-LIKE CLI. AND NO ONE KNOWS THE
10:49AM 20 ANSWER BECAUSE SHE HASN'T DONE THAT ANALYSIS.

10:49AM 21 THE COURT: AND ONE WOULD NOT EXPECT THE DAMAGES
10:49AM 22 EXPERT TO BE ABLE TO DO THAT ANALYSIS. IT IS APPROVED IN THE
10:49AM 23 LAW THAT THIS DAMAGES EXPERT CAN RELY ON THE OPINIONS OF THE
10:50AM 24 TECHNICAL EXPERTS.

10:50AM 25 MR. PAK: THAT'S CORRECT.

10:50AM 1 THE COURT: BUT SHE DOESN'T --

10:50AM 2 MR. PAK: SHE DOES NOT RELY ON THE TECHNICAL OPINIONS
10:50AM 3 OF THE EXPERTS FOR THAT PURPOSE.

10:50AM 4 AND TWO, YOUR HONOR, WHAT THE LAW PERMITS IS THE DAMAGES
10:50AM 5 EXPERT TO CONDUCT SURVEYS.

10:50AM 6 THE COURT: YEAH.

10:50AM 7 MR. PAK: SO SHE COULD HAVE DONE A REGRESSION SURVEY,
10:50AM 8 SHE COULD HAVE DONE ANY NUMBER OF SURVEYS THAT LOOK INTO
10:50AM 9 RELATIVE VALUATION OF THESE FEATURES FROM A CUSTOMER
10:50AM 10 PERSPECTIVE.

10:50AM 11 AND WE UNDERSTAND THAT SHE CAN'T GO INTERVIEW EVERY SINGLE
10:50AM 12 CUSTOMER, BUT SHE COULD HAVE TAKEN A REPRESENTATIVE SAMPLE OF
10:50AM 13 CUSTOMERS LIKE WE DO IN PATENT CASES, SURVEY THEM TO UNDERSTAND
10:50AM 14 HOW DOES CLI RANK. AND THAT ANALYSIS WAS SIMPLY NOT DONE.

10:50AM 15 THE COURT: OKAY.

10:50AM 16 MR. PAK: THANK YOU.

10:50AM 17 MR. SILBERT: GOOD MORNING, YOUR HONOR.

10:50AM 18 DAVID SILBERT FOR ARISTA.

10:50AM 19 LET ME TOUCH ON A COUPLE OF PRELIMINARY ISSUES AND THEN LET
10:50AM 20 ME TALK ABOUT WHAT MS. ELSTEN ACTUALLY DOES FOR HER
10:50AM 21 APPORTIONMENT ANALYSIS WHICH BEARS ESSENTIALLY NO RESEMBLANCE
10:51AM 22 TO THE DESCRIPTION THAT YOU JUST HEARD FROM MR. PAK.

10:51AM 23 BUT TO BEGIN WITH, YOUR HONOR IS ABSOLUTELY CORRECT THAT
10:51AM 24 DISGORGEMENT IS A BENCH ISSUE FOR THE COURT TO DETERMINE. AND
10:51AM 25 WE PRESENTED THIS MOTION BECAUSE IT IS CERTAINLY SOMETIMES TRUE

1 THAT JUDGES WHO NEED TO MAKE A DETERMINATION AFTER TRIAL WILL
2 SEEK AN ADVISORY OPINION FROM A JURY.

3 YOUR HONOR COULD DO THAT AS ESTOPPEL IF YOU CHOSE, YOU
4 COULD DO IT ON THE ISSUE OF DISGORGEMENT IF YOU CHOSE, THAT'S
5 ENTIRELY UP TO YOU. AND SHOULD YOU DO THAT, WE CERTAINLY
6 BELIEVE IT'S CRITICAL THAT THE JURY, IN PARTICULAR, NOT BE
7 GIVEN AN ISSUE -- WE MOVE WITH RESPECT TO DISGORGEMENT ON
8 DR. CHEVALIER BECAUSE WE DON'T WANT HER TO PRESENT A POSITION
9 TO THE JURY THAT WE BELIEVE IS SIMPLY PRECLUDED BY THE LAW.

10 BUT ULTIMATELY, IT IS YOUR HONOR'S DECISION. THERE MAY
11 HAVE BEEN COURTS, CERTAINLY, WHO HAVE COMMITTED IT TO THE JURY
12 BEFORE. THERE MAY EVEN HAVE BEEN SOME UNCERTAINTY ABOUT THIS
13 ISSUE. BUT TO THE EXTENT THERE WAS, IT WOULD HAVE BEEN
14 RESOLVED BY THE SUPREME COURT IN THE PETRELLA CASE WHICH IS THE
15 COPYRIGHT CASE INVOLVING THE MOVIE *RAGING BULL* WHERE THE
16 SUPREME COURT SPECIFICALLY FOUND DISGORGEMENT IS A DIFFERENT
17 TYPE OF REMEDY THAN ACTUAL DAMAGES, AND DISGORGEMENT UNDER THE
18 COPYRIGHT ACT SPECIFICALLY IS AN EQUITABLE REMEDY, NOT A LEGAL
19 REMEDY.

20 AND IN THAT CASE THE COURT HELD THERE WERE DIFFERENCES
21 THERE THAT AFFECT THE ISSUE OF LACHES, SO LACHES IS TREATED
22 DIFFERENTLY FOR DISGORGEMENT.

23 COURTS IN THE NINTH CIRCUIT AM SINCE THEN HAVE CITED
24 PETRELLA AND SPECIFICALLY DENIED A JURY TRIAL ON DISGORGEMENT.

25 THE COURT: AND DO YOU HAVE A NINTH CIRCUIT CASE FOR

10:52AM 1 ME THAT DENIES THE JURY TRIAL?

10:52AM 2 MR. SILBERT: THERE IS A, AND I CAN'T GIVE YOUR HONOR
10:52AM 3 THE CITE RIGHT NOW, WHERE I WAS GOING WITH THIS, WE INTEND TO
10:52AM 4 MOVE IN LIMINE ON THIS ISSUE BECAUSE IT'S NOT --

10:53AM 5 THE COURT: THE REASON I RAISE IT HERE IS THAT I'M
10:53AM 6 LESS INCLINED TO EVEN ENTERTAIN THE DAUBERT DISCUSSION ON AN
10:53AM 7 ISSUE THAT'S TRIED TO THE COURT BECAUSE I CAN EASILY DISREGARD
10:53AM 8 OPINIONS THAT ULTIMATELY HAVE NO FOUNDATION OR ARE EXCLUDED
10:53AM 9 BECAUSE THEY ARE NOT FOUND IN THE DISCLOSURES.

10:53AM 10 AND I JUST DON'T NEED TO ENGAGE IN IT NOW.

10:53AM 11 SO AGAIN, I NEED TO BE VERY EFFICIENT WITH WHAT I'M
10:53AM 12 SPENDING MY TIME ON HERE, AS DO YOU, AND I'VE NEVER KNOWN
10:53AM 13 DISGORGEMENT TO BE A JURY ISSUE. BUT I'VE NEVER SEEN
10:53AM 14 DISGORGEMENT REQUESTED IN A COPYRIGHT CASE.

10:53AM 15 SO WELL, FOR EXAMPLE, IN THE ORACLE V. GOOGLE CASE, THERE
10:53AM 16 WAS A DISGORGEMENT ISSUE, CORRECT?

10:53AM 17 MR. SILBERT: THERE WAS, BUT THERE WAS NO DAMAGES
10:53AM 18 TRIAL, ULTIMATELY.

10:53AM 19 THE COURT: SO THERE WAS NEVER A DAMAGES TRIAL. AND
10:53AM 20 WERE THERE PRETRIAL RULINGS THAT INDICATED ONE WAY OR THE OTHER
10:53AM 21 OR HAD YOU NOT GOTTEN THERE?

10:54AM 22 MR. SILBERT: I WILL HAVE TO DEFER TO --

10:54AM 23 MR. VAN NEST: I WOULD HAVE TO GO BACK AND LOOK AT
10:54AM 24 THE RECORD. I THINK JUDGE ALSUP DEFERRED IT. HE BIFURCATED,
10:54AM 25 WE DISCUSSED IT, IT WASN'T RESOLVED, IT'S MY RECOLLECTION --

10:54AM 1 AND THEN OF COURSE --

10:54AM 2 THE COURT: HE WAS WISE TO BIFURCATE, HE NEVER HAD TO
10:54AM 3 HEAR IT.

10:54AM 4 MR. VAN NEST: THAT'S RIGHT. TWICE.

10:54AM 5 THE COURT: TWICE. OKAY.

10:54AM 6 MR. SILBERT: WE CAN PROVIDE YOUR HONOR WITH A
10:54AM 7 CITATION TO A CENTRAL DISTRICT --

10:54AM 8 THE COURT: I JUST WANT A CITATION.

10:54AM 9 MR. SILBERT: A CENTRAL DISTRICT OF CALIFORNIA CASE,
10:54AM 10 THE NAME ESCAPES ME RIGHT NOW. THE IMPORTANT THING IS IT'S
10:54AM 11 POST PETRELLA AND IT FINDS BASED ON PETRELLA, IT DENIES A JURY
10:54AM 12 TRIAL.

10:54AM 13 THE COURT: AND PETRELLA IS A COPYRIGHT CASE AS WELL?

10:54AM 14 MR. SILBERT: PETRELLA IS A COPYRIGHT CASE IN THE
10:54AM 15 SUPREME COURT THAT FINDS THAT DISGORGEMENT IS AN EQUITABLE
10:54AM 16 REMEDY. AND IT DISTINGUISHES DISGORGEMENT FROM ACTUAL
10:54AM 17 DAMAGES --

10:54AM 18 THE COURT: SURE. AND MR. PAK, IF YOU HAVE ANYTHING
10:54AM 19 DIFFERENT.

10:54AM 20 MR. PAK: YES.

10:54AM 21 THE COURT: I'M LOOKING FOR A PAGE AND A HALF ON THIS
10:54AM 22 IF YOU WANT TO SUBMIT IT. I JUST REALLY NEED THE CITATIONS
10:55AM 23 BECAUSE I ACTUALLY WILL TAKE A DIFFERENT ROUTE ON THE
10:55AM 24 ELSTEN/CHEVALIER, AND I THINK THAT'S GOING TO WORK FOR YOU AS
10:55AM 25 WELL BECAUSE WE HAVE LOTS OF LATITUDE IN A BENCH TRIAL, IF WE

10:55AM 1 EVEN GET THERE.

10:55AM 2 MR. SILBERT: UNDERSTOOD. SINCE WE DON'T KNOW AT
10:55AM 3 THIS POINT HOW THAT'S GOING TO TURN OUT, IF I MAY, I WOULD LIKE
10:55AM 4 TO JUST ADDRESS --

10:55AM 5 THE COURT: LET'S DO THAT SINCE YOU ARE HERE, YES.

10:55AM 6 MR. SILBERT: AND LET ME SAY ONE THING, FIRST OF ALL,
10:55AM 7 ABOUT THE CAUSAL NEXUS ISSUE.

10:55AM 8 I THINK THAT A MOUNTAIN HAS BEEN MADE OF A MOLE HILL HERE.
10:55AM 9 I DON'T THINK THE COURT NEEDS TO DEVOTE RESOURCES TO IT. IT IS
10:55AM 10 TRUE THAT DR. CHEVALIER, EXCUSE ME, THAT MS. ELSTEN NOTES THAT
10:55AM 11 DR. CHEVALIER DID NOT MAKE ANY PARTICULAR COMMENTS OR FINDINGS
10:55AM 12 TO SUPPORT A NEXUS, BUT MS. ELSTEN THEN TAKES HER ROYALTY BASE
10:55AM 13 ANYWAY AND USES IT AS THE ROYALTY BASE THAT SHE FORMULATES HER
10:55AM 14 OPINION ON.

10:55AM 15 SO ALTHOUGH SHE CRITICIZES THE LACK OF DISCUSSION OF NEXUS
10:56AM 16 IN DR. CHEVALIER'S OPINION, SHE DOESN'T CHANGE, TO BE AS
10:56AM 17 CONSERVATIVE AS POSSIBLE. SHE SAYS, I'M GOING TO ASSUME THAT A
10:56AM 18 NEXUS HAS BEEN PROVEN ANYWAY, AND I'M GOING TO START WITH THIS
10:56AM 19 ROYALTY BASE.

10:56AM 20 THE COURT: WELL, SURE, THAT'S A LEGAL ISSUE, SHE
10:56AM 21 DOESN'T HAVE TO GET BOGGED DOWN WITH IT, NOR COULD SHE GIVE AN
10:56AM 22 OPINION.

10:56AM 23 MR. SILBERT: NOR DOES THE COURT, THAT'S OUR POINT.
10:56AM 24 IT DOESN'T PLAY A ROLE IN THE ACTUAL OPINIONS SHE EXPRESSES --
10:56AM 25 FOR PURPOSES OF THIS MOTION --

10:56AM 1 THE COURT: SO YOU ARE NOT SUGGESTING CISCO HAS TO
10:56AM 2 ESTABLISH ANYTHING MORE THAN THEY HAVE THROUGH THE -- OF THE
10:56AM 3 PROFITS OF THE DIRECT PROFITS OFF OF THE INFRINGING PRODUCT.

10:56AM 4 MR. SILBERT: FOR PURPOSES OF ESTABLISHING A ROYALTY
10:56AM 5 BASE, THAT'S TRUE.

10:56AM 6 THE COURT: OKAY. GOOD. THAT'S GREAT. I'VE LEARNED
10:56AM 7 ABOUT THE LAW AND WE ARE MOVING FORWARD.

10:56AM 8 MR. SILBERT: SO NOW LET'S TALK ABOUT HER
10:56AM 9 DISGORGEMENT OPINION AND HER APPORTIONMENT OF PROFITS.

10:56AM 10 AND LET ME FIRST OF ALL DIRECT YOUR HONOR'S ATTENTION TO
10:57AM 11 WHAT THE ACTUAL LAW IS ON THIS PARTICULAR ISSUE, IT'S NOT THE
10:57AM 12 SAME AS ACTUAL DAMAGES UNDER PATENTS, IT WOULD BE A MISTAKE TO
10:57AM 13 APPLY THOSE SAME CRITERIA.

10:57AM 14 THE COURT: OKAY.

10:57AM 15 MR. SILBERT: AND THE NINTH CIRCUIT -- AND BY THE
10:57AM 16 WAY, I THINK EVEN IF THE COURT DID APPLY THOSE CRITERIA,
10:57AM 17 NOTHING WOULD BE EXCLUDED HERE.

10:57AM 18 BUT LET'S BE CLEAR, THE NINTH CIRCUIT HAS SAID NUMEROUS
10:57AM 19 TIMES AND THE SUPREME COURT, THAT WHEN WE ARE TALKING ABOUT
10:57AM 20 APPORTIONMENT OF PROFITS FOR PURPOSES OF A DISGORGEMENT
10:57AM 21 ANALYSIS, WE ALL RECOGNIZE THAT IT'S VERY DIFFICULT TO DO THAT,
10:57AM 22 THERE ARE NO CERTAIN BOUNDARIES. AND THE SUPREME COURT SAYS,
10:57AM 23 WHAT IS REQUIRED IS ONLY A REASONABLE APPROXIMATION.

10:57AM 24 THAT'S QUOTED BY THE NINTH CIRCUIT IN THE CREAM RECORDS
10:57AM 25 CASE. AND THE CREAM RECORDS PANEL GOES ON TO SAY, YOU KNOW,

1 LOOK, ULTIMATELY, CREAM, THAT'S THE PLAINTIFF'S CALCULATION, IS
2 IN THE END, NO LESS SPECULATIVE THAN THAT OF THE COURT.

3 THEY SAY YOURS IS PRETTY SPECULATIVE, THE DISTRICT COURTS'
4 IS PRETTY SPECULATIVE.

5 I WOULD COMMEND YOUR HONOR TO READ THAT CASE AND COMPARE
6 THE ACTUAL ANALYSIS DONE IN THAT CASE, WHICH WAS REALLY LICKING
7 YOUR FINGER AND PUTTING IT UP TO THE WIND BY THE DISTRICT. AND
8 THE NINTH CIRCUIT SAID, WELL, IT'S GOOD ENOUGH.

9 THE COURT: AND THE CASE LAW ALSO SUGGESTS THAT IN
10 THE ABSENCE OF A DEFENSE APPORTIONMENT, I STILL WHEN THE RECORD
11 IS CLEAR, WOULD HAVE TO RULE ON SOME REASONABLE APPORTIONMENT.

12 MR. SILBERT: I WOULD SAY CASE LAW DOESN'T SUGGEST
13 THAT, THE CASE LAW MANDATES THAT.

14 BUT THAT'S CORRECT. AND IF YOUR HONOR FOR A MINUTE
15 COMPARED THE APPORTIONMENT METHODOLOGY THAT WAS APPROVED BY THE
16 NINTH CIRCUIT IN CREAM RECORDS TO THE EXTREMELY DETAILED AND
17 FACT-BASED METHODOLOGY USED BY MS. ELSTEN, THERE'S NO
18 COMPARISON, THERE'S SIMPLY NO COMPARISON. AND MORE TO THE
19 POINT I MADE RIGHT HERE IS, THE STANDARD THAT GETS REQUIRED TO
20 THIS TYPE OF APPORTIONMENT ON DISGORGEMENT IS NOT THE PATENT'S
21 ACTUAL PROOF OF ACTUAL DAMAGES.

22 THERE'S MORE QUOTES AGAIN FROM THE NINTH CIRCUIT IN THE
23 ABEND CASE QUOTING JUDGE LEARNED HAND WHO SAYS THERE'S REALLY
24 NO REAL STANDARD THAT CAN GOVERN THIS. AND THE NINTH CIRCUIT
25 SAYS, WE RECOGNIZE COURTS CAN'T BE EXPECTED TO DETERMINE WITH

10:59AM 1 MATHEMATICAL EXACTNESS AN APPORTIONMENT OF PROFITS. WE REQUIRE
10:59AM 2 ONLY A REASONABLE AND JUST APPORTIONMENT.

10:59AM 3 THAT'S ALL THAT IS REQUIRED.

10:59AM 4 THE COURT: BUT I DON'T THINK MR. PAK IS ARGUING THAT
10:59AM 5 POINT. WHAT HE'S SAYING IS THAT THERE'S NO FOUNDATION FOR THE
10:59AM 6 EQUAL VALUE TO EACH OF THE ELEMENTS OF THE SWITCH.

10:59AM 7 IT'S AN EVIDENTIARY ISSUE HE'S CONTESTING, NOT A LEGAL
10:59AM 8 STANDARD. YOU DON'T HAVE TO PROVE IT TO A REASONABLE
10:59AM 9 CERTAINTY. OKAY. THAT'S FINE. I DON'T THINK THAT'S ISSUE
10:59AM 10 BEFORE ME.

10:59AM 11 MR. SILBERT: SO LET ME GET TO HIS --

10:59AM 12 THE COURT: NOW IT MAY BE SIMPLY THAT THE TRIER OF
10:59AM 13 FACT, WHETHER IT'S ME OR THE JURY, CAN SIMPLY REJECT IT AS NOT
11:00AM 14 BEING CREDIBLE, WHICH OF COURSE ANY TRIER OF FACT CAN DO WITH
11:00AM 15 ANY OPINION.

11:00AM 16 SO WE ARE JUST AT THE THRESHOLD OF UNDER THIS CREAM RECORDS
11:00AM 17 STANDARD, WOULD I BE WISE TO LET IT IN AND SEE HOW CREDIBLE IT
11:00AM 18 IS AND HOW IT STANDS UP TO CROSS-EXAMINATION AND REBUTTAL.

11:00AM 19 MR. SILBERT: RIGHT.

11:00AM 20 AND HIS FACTUAL STATEMENTS ARE INCORRECT ABOUT SAYING
11:00AM 21 THERE'S NO FOUNDATION. AND I WANT TO GET TO THAT. BUT I DO
11:00AM 22 WANT TO MAKE THE POINT, THAT WHETHER OR NOT AN EQUAL
11:00AM 23 APPORTIONMENT WOULD BE ADMISSIBLE AND VALID UNDER A PATENT
11:00AM 24 DAMAGES STANDARD WHERE A PLAINTIFF IS PROVING ACTUAL DAMAGES,
11:00AM 25 AND THOSE ARE THE CASES THAT MR. PAK CITES, THAT'S THE STANDARD

11:00AM 1 HE'S APPLYING. EVEN THEN, I THINK IT WOULD CLEARLY BE
11:00AM 2 ADMISSIBLE IN THE INFORMATION AT ISSUE HERE.

11:00AM 3 BUT THAT IS NOT THE STANDARD. AND I THINK CLEARLY, AGAIN,
11:00AM 4 IF YOUR HONOR WERE TO LOOK AT WHAT THE COURT DID IN CREAM
11:01AM 5 RECORDS AND OTHER CASES, CLEARLY WHAT'S DONE HERE FAR SURPASSES
11:01AM 6 THAT IN TERMS OF RIGOR, IN TERMS OF THE AMOUNT OF DATA, WHICH
11:01AM 7 IS ACTUALLY CONTRARY TO WHAT MR. PAK SAID, EXTREMELY EXTENSIVE
11:01AM 8 AND SO FORTH.

11:01AM 9 BUT LET ME GET TO THAT.

11:01AM 10 THE COURT: AND YOU OF COURSE CAN ASK YOUR COLLEAGUES
11:01AM 11 AT WILSON SONSINI WHETHER THEY -- WHAT KIND OF FOUNDATION WAS
11:01AM 12 NECESSARY IN THE FINJAN CASE BECAUSE THEY KNOW ALL TOO WELL.

11:01AM 13 MR. SILBERT: IF I CAN JUST TURN TO SLIDE 10,
11:01AM 14 YOUR HONOR.

11:01AM 15 AND THERE'S NO WAY THAT THE COURT COULD DECIDE THIS MOTION
11:01AM 16 WITHOUT READING MS. ELSTEN'S ACTUAL OPINIONS WHICH APPEAR AT
11:01AM 17 PAGES 80 THROUGH 94, SPECIFICALLY, ALTHOUGH SHE DOES REFER BACK
11:01AM 18 TO MANY OTHER SECTIONS OF HER REPORT, IN HER REPORT OF
11:01AM 19 JULY 13TH.

11:01AM 20 AS I SAID AT THE BEGINNING, YOUR HONOR WON'T RECOGNIZE THEM
11:01AM 21 FROM THE WAY MR. PAK DESCRIBED THEM, THEY BEAR NO RESEMBLANCE
11:01AM 22 WHATSOEVER TO THE CHARACTERIZATION THAT HE GAVE OF THEM. BUT
11:02AM 23 ONE OF THE THINGS THAT MR. PAK SAID WAS SHE DOESN'T DO ANY KIND
11:02AM 24 OF WEIGHING AT ALL, AND IN FACT SHE SAYS IN HER DEPOSITION,
11:02AM 25 ACCORDING TO MR. PAK, THAT SHE DOESN'T WEIGH ANYTHING AND

1 THEREFORE THAT'S DISQUALIFYING.

2 SHE ACTUALLY, THESE ARE ALL QUOTATIONS FROM HER REPORT AT
3 PAGES 85 THROUGH 87, SHE ACTUALLY DOES A LOT OF WEIGHING AND
4 SHE DOES RELY ON MR. SEIFERT, AMONG OTHER SOURCES, AND SHE
5 TALKS ABOUT HOW THE FACTORS ARE WEIGHED.

6 HERE IN THE FIRST PARAGRAPH SHE SAYS, HOWEVER, AS DISCUSSED
7 EARLIER AND SUPPORTED BY APPENDIX D, THE PREPONDERANCE OF THE
8 EVIDENCE AVAILABLE IN THE CASE INDICATES THAT MANY, IF NOT MOST
9 OF THE FEATURES IDENTIFIED, WERE OF MORE IMPORTANCE TO MORE
10 CUSTOMERS THAN THE NATURE OF THE CLI.

11 THAT'S REFERRING TO A LOT OF OTHER INFORMATION --

12 THE COURT: WHAT'S APPENDIX D?

13 MR. SILBERT: APPENDIX D, I WOULD NEED TO CHECK. BUT
14 SHE'S ALSO REFERRING TO A PRIOR DISCUSSION.

15 THE COURT: WELL, WE CAN MOVE ON.

16 MR. SILBERT: SHE TALKS ABOUT HOW -- IN THE NEXT
17 PARAGRAPH SHE TALKS ABOUT HOW CONTINUED INVESTMENT IN R&D AND
18 NUMEROUS FEATURES OVER THE TIME PERIOD HAS CAUSED THE RELATIVE
19 IMPORTANCE OF THE CLI TO DIMINISH FURTHER OVER TIME TO THE
20 OVERALL VALUE OF THE SOFTWARE, MEANING IT'S WEIGHTED FURTHER
21 EVEN LESS.

22 SHE SAYS AT THE BOTTOM SHE LOOKS AT ALL THE BLOCK DIAGRAMS.
23 AND SHE SAYS, I UNDERSTAND THAT WITHOUT SYSDB OR LINUX KERNEL,
24 EOS WOULD NOT WORK. THUS, THESE FEATURES MAY HAVE A HIGHER
25 IMPORTANCE THAN OTHERS. CONVERSELY. I UNDERSTAND SEVERAL LIST

11:03AM 1 COMPONENTS SUCH AS CLI, ARE NOT REQUIRED.

11:03AM 2 SHE SAYS, BY ASSUMING EACH BLOCK IS OF EQUAL VALUE, THE
11:03AM 3 VALUE OF THE CLI IS LIKELY OVERSTATED.

11:04AM 4 LET ME POINT OUT JUST SOME EXAMPLES, THERE'S NO WAY IN THE
11:04AM 5 TIME ALLOTTED WE COULD GO THROUGH HER ENTIRE OPINION ON
11:04AM 6 APPORTIONMENT, BUT SHE DOES A QUITE EXTENSIVE ANALYSIS OF
11:04AM 7 WEIGHTING DIFFERENT FEATURES WITHIN THE OPERATING SYSTEM

11:04AM 8 AND HERE'S WHAT HE SHE ACTUALLY DOES, INSTEAD OF WHAT CISCO
11:04AM 9 IS CLAIMING SHE DOES. AT THE END OF ALL OF THAT, WHAT SHE SAYS
11:04AM 10 IS -- WHAT SHE SAYS IS, HERE'S A RANGE, AND SHE GIVES A
11:04AM 11 PERCENTAGE RANGE. I'VE BLACKED OUT THE NUMBERS, AND I'M GOING
11:04AM 12 TO HAVE THIS SLIDE HERE, BUT --

11:04AM 13 THE COURT: I THINK I HAVE THIS ONE.

11:04AM 14 MR. SILBERT: HERE'S A RANGE, I'M LOOKING AT ALL OF
11:04AM 15 THIS DATA, AND THERE'S EXTENSIVE AMOUNTS OF DATA OF WHAT YOU
11:04AM 16 COULD SAY THE CLI IS WORTH. SHE SAYS, IF I TREAT THE CLI AS
11:04AM 17 EQUAL, EQUALLY WEIGHTED ON ALL THESE OTHER FACTORS, AND I
11:04AM 18 POINTED THIS OUT BEFORE, SHE SAYS, I'M ACTUALLY WEIGHTING IT
11:04AM 19 TOO HIGH BASED ON ALL THIS OTHER EVIDENCE THAT I'VE LOOKED AT
11:04AM 20 THAT INDICATES IT HASN'T LOWERED, BUT I'M GOING TO ERR IN FAVOR
11:05AM 21 OF CISCO AND PICK THE HIGHEST RANGE THAT I COULD PICK, EVEN
11:05AM 22 THOUGH I THINK IT'S AN ERROR, IT'S TOO HIGH, I'M ERRING ON THE
11:05AM 23 SIDE OF BEING TOO HIGH FOR CISCO. THAT'S WHAT I'M GOING TO DO.

11:05AM 24 NOW THAT, IF YOUR HONOR READS CISCO'S BRIEFING ON OUR
11:05AM 25 MOTION DIRECTED TO DR. CHEVALIER, THAT'S EXACTLY WHAT THEY SAY

11:05AM 1 THE LAW REQUIRES. THEY SAY YOU ARE SUPPOSED TO ERR IN FAVOR OF
11:05AM 2 THE PLAINTIFF.

11:05AM 3 THE COURT: YEAH.

11:05AM 4 MR. SILBERT: SO THAT'S WHAT SHE DOES. IT'S NOT THAT
11:05AM 5 SHE DOES NO WEIGHTING. SHE DOES A LOT OF WEIGHTING.

11:05AM 6 THE COURT: WHAT ABOUT HER DEPOSITION TESTIMONY,
11:05AM 7 THOUGH?

11:05AM 8 MR. SILBERT: IT'S A SINGLE QUESTION AND ANSWER ABOUT
11:05AM 9 A SINGLE TABLE. IF YOU LOOK AT THE SLIDE, IT SAYS, EXCLUDING
11:05AM 10 YOUR ANALYSIS OF THE RFP'S, AND IN THIS TABLE DID YOU CONSIDER
11:05AM 11 RELATIVE IMPORTANCE. AND SHE SAYS, IN THIS TABLE I DIDN'T.
11:05AM 12 BUT THAT'S NOT HER WHOLE OPINION.

11:05AM 13 SO TO SAY THAT SHE DID NO WEIGHTING IS SIMPLY NOT TRUE. TO
11:05AM 14 SAY, AS MR. PAK DID, THAT SHE JUST LOOKED AT ONE DOCUMENT AND
11:06AM 15 THAT'S HER WHOLE OPINION IS NOT EVEN CLOSE TO TRUE. SHE LOOKED
11:06AM 16 AT LITERALLY THOUSANDS OF PAGES OF VERY DENSE INFORMATION.

11:06AM 17 AND AGAIN, I DO NOT WANT TO BELABOR THE COURT, AND WE DON'T
11:06AM 18 BEGIN TO HAVE TIME, BUT SHE LOOKS AT, SHE ANALYZES THE
11:06AM 19 THOUSANDS OF RFP'S AND DOES A STATISTICAL ANALYSIS AND
11:06AM 20 DETERMINES HOW MANY OF THEM OF ASK ABOUT, AND SHE POINTS OUT
11:06AM 21 THAT CUSTOMERS IN RFP'S LIST THE FEATURES THEY WANT. THAT'S
11:06AM 22 THE PURPOSE OF THESE RFP'S AND IT'S CLEAR LOOKING AT THEM THAT
11:06AM 23 THEY DO.

11:06AM 24 HOW MANY MENTION A CLI AT ALL? SHE LOOKS AT THAT DATA AND
11:06AM 25 THOSE SPECIFIC PERCENTAGES. HOW MANY MENTION AN INDUSTRY

11:06AM 1 STANDARD CISCO-LIKE CLI? SHE HAS SPECIFIC PERCENTAGES ABOUT
11:06AM 2 THAT.

11:06AM 3 SHE LOOKS AT CERTAIN RFP'S FROM ONE VERY SIGNIFICANT
11:06AM 4 CUSTOMER THAT ACTUALLY ASSIGNS A NUMERICAL WEIGHT TO EACH
11:06AM 5 FEATURE, EVERY SINGLE FEATURE. AND SHE SAYS, WELL, THIS IS A
11:07AM 6 PRETTY GOOD INDICATION OF HOW MUCH VALUE THEY PLACE ON EACH
11:07AM 7 FEATURE, THAT CUSTOMER, ABOUT -- THERE'S A WEIGHT THEY APPLY TO
11:07AM 8 CLI ABOUT -- THERE'S A SEPARATE ENTRY FOR A FAMILIAR CLI, AND
11:07AM 9 THEY SAY SPECIFICALLY -- WE DON'T EVEN PLAN TO USE THE FAMILIAR
11:07AM 10 CLI. SO THEY ESSENTIALLY, WE DON'T CARE WHETHER YOU HAVE ONE
11:07AM 11 OR NOT.

11:07AM 12 SHE TAKES THAT INTO ACCOUNT. AND THE NUMERICAL WEIGHTS.

11:07AM 13 SHE LOOKS AT MARKETING DOCUMENTS AND DOES EXTENSIVE
11:07AM 14 ANALYSIS OF MARKETING DOCUMENTS, WHAT THEY MENTION, WHAT THEY
11:07AM 15 DON'T MENTION, WHAT CATEGORIES THEY LIST, HOW THEY DESCRIBE
11:07AM 16 THINGS. OTHER TECHNICAL DOCUMENTS. IT'S VERY, VERY DETAILED.

11:07AM 17 AND AGAIN, IT'S -- YOUR HONOR MIGHT FORM ONE CONCLUSION
11:07AM 18 LISTENING TO MR. PAK DESCRIBE WHAT SHE DID. IF YOUR HONOR
11:07AM 19 LOOKS AT WHAT MS. ELSTEN ACTUALLY DID AND PARTICULARLY COMPARES
11:07AM 20 IT TO THE STANDARD SET BY THE NINTH CIRCUIT FOR AN
11:07AM 21 APPORTIONMENT ANALYSIS, THERE'S NO WAY IT DOESN'T PASS MUSTER.

11:07AM 22 THE COURT: OKAY. ALL RIGHT. SHOULD WE MOVE ON TO
11:07AM 23 CHEVALIER THEN?

11:08AM 24 MR. PAK: YES.

11:08AM 25 THE COURT: SO MR. SILBERT, ARE YOU GOING TO START?

11:08AM 1 MR. SILBERT: I AM.

11:08AM 2 SO YOUR HONOR, THERE ARE TWO OPINIONS EXPRESSED BY
11:08AM 3 DR. CHEVALIER THAT ARE NOT PROPER EXPERT TESTIMONY AND THAT WE
11:08AM 4 ARE MOVING TO EXCLUDE. THE FIRST IS WHAT SHE CALLS HER NO
11:08AM 5 APPORTIONMENT DISGORGEMENT OPINION.

11:08AM 6 AND WHAT'S SHOWN HERE ON SLIDE THREE IS SIMPLY AN EXCERPT
11:08AM 7 FROM ONE OF HER EXHIBITS WHERE SHE SHOWS A SUMMARY OF THE
11:08AM 8 DAMAGES, BUT IT'S SIMPLY HERE AS AN INDICATION THAT SHE'S GOT
11:08AM 9 TWO OF WHAT SHE CALLS CASES, CASE 1 AND 3 WHERE SHE APPLIES
11:08AM 10 ZERO APPORTIONMENT

11:08AM 11 THE COURT: AS WAS ARGUED BY CISCO, SHE STARTS WITH
11:08AM 12 SAYING, BECAUSE ARISTA DIDN'T MEET ITS BURDEN TO SHOW
11:09AM 13 APPORTIONMENT, THEN THERE'S NO EVIDENCE THEREFORE THERE'S NO
11:09AM 14 APPORTIONMENT. IT'S NOT THAT SHE'S SAYING THAT I'VE STUDIED
11:09AM 15 THE MARKET AND NO APPORTIONMENT IS APPROPRIATE. THAT'S A BIG
11:09AM 16 DIFFERENCE.

11:09AM 17 MR. SILBERT: WELL, IT IS A BIG DIFFERENCE, BUT IT
11:09AM 18 DOESN'T HELP CISCO. IT DOESN'T HELP BECAUSE THE WAY -- UNDER
11:09AM 19 THE CREAM RECORDS CASE AND OTHER NINTH CIRCUIT CASE LAW, THE
11:09AM 20 ONLY SITUATION OR TWO SITUATIONS WHERE A PLAINTIFF CAN REQUEST
11:09AM 21 100 PERCENT OF THE DAMAGES, ARE WHERE AN EXPERT ACTUALLY DOES
11:09AM 22 WHAT YOUR HONOR WAS CLEAR TO POINT OUT AND CISCO WAS CLEAR TO
11:09AM 23 POINT OUT SHE DID NOT DO.

11:09AM 24 THERE ARE CASES WHERE A HUNDRED PERCENT OF THE PROFITS
11:09AM 25 MIGHT BE DUE TO INFRINGEMENT.

11:09AM 1 THE COURT: OH, SURE, OF COURSE.

11:09AM 2 MR. SILBERT: IF I BOOTLEG A MOVIE AND I SELL IT,
11:09AM 3 PROBABLY ALL THOSE PROFITS ARE COMING FROM MY INFRINGEMENT.

11:09AM 4 IF I'M SELLING A TV AND SOMEBODY IS SAYING THESE BUTTONS ON
11:09AM 5 THE REMOTE CONTROL ARE OURS --

11:09AM 6 THE COURT: AND I WILL HEAR FROM MR. PAK ON THIS, IF
11:10AM 7 SHE'S GOING TO TESTIFY THAT I'VE EVALUATED DR. ELSTEN'S OPINION
11:10AM 8 ON APPORTIONMENT, I FIND IT, IT HAS -- IT SHOULD BE GIVEN NO
11:10AM 9 WEIGHT. IT'S FULL OF HOLES, YOU SHOULD DISREGARD IT. AND IF
11:10AM 10 THERE'S NO EVIDENCE WHICH IS, AND THIS IS OF COURSE ATTORNEY
11:10AM 11 ARGUMENT, THEN IT'S 100 PERCENT.

11:10AM 12 NOW MAYBE IT'S ATTORNEY ARGUMENT. AND MAYBE DR. CHEVALIER
11:10AM 13 SHOULDN'T BE THE ONE TO SAY THE HUNDRED PERCENT. AND THE CISCO
11:10AM 14 SHOULD ARGUE TO THE JURY THAT THEY ARE TO DISREGARD
11:10AM 15 DR. ELSTEN'S APPORTIONMENT, AND BECAUSE OF THE LEGAL STANDARD
11:10AM 16 THEY SHOULD FIND IT'S 100 PERCENT, IF IT GOES TO THE JURY, OF
11:10AM 17 COURSE.

11:10AM 18 MR. SILBERT: RESPECTFULLY, YOUR HONOR, IT'S NOT EVEN
11:10AM 19 ATTORNEY ARGUMENT, IT WOULD BE ERROR. IT WOULD BE ERROR TO
11:10AM 20 REQUEST 100 PERCENT OF THE PROFITS. AND I UNDERSTAND THIS IS A
11:10AM 21 LITTLE BIT OF AN UNUSUAL SITUATION --

11:10AM 22 THE COURT: WELL, I DON'T KNOW IF IT'S ERROR TO
11:10AM 23 REQUEST IT. IT MIGHT BE ERROR TO -- I THINK EVEN UNDER YOUR
11:10AM 24 VIEW OF -- EVEN IF THIS GOES TO THE JURY, AND LET'S SAY CISCO
11:11AM 25 WAS PERSUASIVE AND IT CAME OUT AT 100 PERCENT, I THINK THAT I

11:11AM 1 STILL, ON POST-TRIAL EITHER POST-VERDICT BEFORE JUDGMENT, I
11:11AM 2 WOULD STILL BE AUTHORIZED AND EMPOWERED TO MODIFY THAT
11:11AM 3 APPORTIONMENT BASED ON THE EVIDENCE. DON'T YOU AGREE?

11:11AM 4 MR. SILBERT: WELL, YES --

11:11AM 5 THE COURT: SO I DON'T THINK IT WOULD BE ERROR FOR ME
11:11AM 6 TO ALLOW THE ARGUMENT, BECAUSE IT IS A VALID THEORY.

11:11AM 7 MR. SILBERT: FAIR POINT.

11:11AM 8 THE COURT: IT JUST MAY BE THE EVIDENCE DOESN'T
11:11AM 9 SUPPORT IT.

11:11AM 10 SO NOW I THINK I'M ACTUALLY AT THE POINT WHERE I HAVE TO
11:11AM 11 DETERMINE WHETHER AN EXPERT CAN GIVE AN OPINIONS THAT ACTUALLY
11:11AM 12 A LEGAL ARGUMENT ON THE FAILURE OF PROOF, BECAUSE YOU DO HAVE
11:11AM 13 THE BURDEN OF APPORTIONMENT, THERE'S NO QUESTION.

11:11AM 14 MR. SILBERT: YES.

11:11AM 15 THE COURT: BUT DR. CHEVALIER CAN SAY, I DON'T FIND
11:11AM 16 DR. ELSTEN'S ECONOMIC ANALYSIS PERSUASIVE AT ALL AND YOU SHOULD
11:11AM 17 DISREGARD IT. SHE CAN POKE HOLES IN IT.

11:12AM 18 MR. SILBERT: YES.

11:12AM 19 THE COURT: BUT THE NEXT STEP OF SAYING THEREFORE YOU
11:12AM 20 ARE LEFT WITH HAVING TO AWARD 100 PERCENT IS PROBABLY NOT THE
11:12AM 21 SUBJECT OF HER EXPERT OPINION.

11:12AM 22 MR. SILBERT: AND THAT STEP, IT ALSO WOULD BE
11:12AM 23 INCONSISTENT WITH NINTH CIRCUIT CASE LAW.

11:12AM 24 AND THAT'S THE POINT I WANT TO MAKE AND I DO WANT TO POINT
11:12AM 25 OUT TO YOUR HONOR BECAUSE IT'S -- I THINK IT'S AN EASY CHAIN OF

1 LOGIC TO TAKE THE STEPS THAT YOUR HONOR WAS DESCRIBING, BUT IT
2 ACTUALLY IN THIS PARTICULAR CASE, LEADS YOU TO AN IMPROPER
3 RESULT, BECAUSE IT'S EASY TO SAY, WELL YOU HAVE THE BURDEN AND
4 THEREFORE IF YOU DON'T CARRY YOUR BURDEN TO APPORTION, MAYBE
5 THEY GET EVERYTHING.

6 BUT IN THE CREAM RECORDS CASE IN PARTICULAR AND THE ABEND
7 CASE AND OTHER CASES THAT WE CITE, ABEND DISCUSSES SOME OTHERS,
8 WHAT THEY EXPLAINED IS THAT'S NOT THE WAY THE BURDEN OF PROOF
9 WORKS IN THIS PARTICULAR CASE WHERE YOU ARE TALKING ABOUT AN
10 EQUITABLE REMEDY OF DISGORGEMENT.

11 SO THE FACTS OF THE CREAM RECORDS CASE ARE PARTICULARLY
12 INSTRUCTIVE. IN THAT CASE THE INFRINGER PUT ON NO EVIDENCE.
13 AND THAT'S WHAT THEY SAID IN THE CASE, THEY DIDN'T PUT ON ANY
14 EVIDENCE AT ALL ON APPORTIONMENT, SO CLEARLY THEY DIDN'T CARRY
15 THEIR BURDEN. AND THE PLAINTIFF SAID IN THE NINTH CIRCUIT THEY
16 DIDN'T PUT ON ANY EVIDENCE SO THEREFORE WE SHOULD GET WHAT WE
17 ASKED FOR.

18 THE NINTH CIRCUIT SAYS ALTHOUGH THE STATUTE IMPOSES UPON
19 THE INFRINGER THE BURDEN OF SHOWING THE ELEMENTS OF PROFIT
20 ATTRIBUTABLE TO FACTORS OTHER THAN THE COPYRIGHTED WORK,
21 NONETHELESS, WHETHER IT IS CLEAR AS IT IS IN THIS CASE THAT NOT
22 ALL THE PROFITS ATTRIBUTABLE TO THE INFRINGING MATERIAL, THE
23 COPYRIGHT OWNER IS NOT ENTITLED TO RECOVER ALL OF THOSE
24 PROFITS.

25 THEY TALK ABOUT THE COURT HAVING A DUTY TO MAKE AN

11:13AM 1 APPORTIONMENT EVEN IF IT THE DEFENDANT DOESN'T DO IT. AND THEY
11:13AM 2 TALK ABOUT --

11:13AM 3 THE COURT: BUT I GUESS, LET ME BACK UP, I DON'T HAVE
11:13AM 4 CREAM RECORDS RIGHT HERE, THERE'S A DIFFERENCE BETWEEN ALLOWING
11:13AM 5 THE EVIDENCE, AND I'M NOT INCLINED TO ALLOW THE EVIDENCE OF
11:13AM 6 ZERO APPORTIONMENT, I THINK IT'S LEGAL ARGUMENT, ALLOWING THE
11:14AM 7 ARGUMENT IS DIFFERENT THAN THE ULTIMATE JUDGMENT IN THE CASE.

11:14AM 8 AND SO BECAUSE, I MEAN I'M DOUBTFUL THAT THIS IS GOING TO
11:14AM 9 THE JURY, AND BECAUSE IT IS -- MY GUESS IS THE REVENUE NUMBER
11:14AM 10 WILL NOT BE A CONTESTED ISSUE AND THE PERCENTAGE, I WILL HAVE
11:14AM 11 OPINIONS, IT'S JUST SOME BASIC ARITHMETIC HERE ON DISGORGEMENT.
11:14AM 12 I'M NOT INCLINED, IF I DON'T HAVE TO, TO SEND IT TO THE JURY
11:14AM 13 FOR AN ADVISORY. ACTUAL DAMAGES BEING SO DIFFERENT.

11:14AM 14 AND SO I DON'T THINK IT'S ERROR TO LET CISCO ARGUE THE
11:14AM 15 HUNDRED PERCENT.

11:14AM 16 MR. SILBERT: WELL, I GUESS I DON'T WANT TO SPLIT
11:14AM 17 HAIRS, BUT WOULD IT BE ERROR IF THEY ARGUED IT BUT IT WASN'T
11:14AM 18 ACTUALLY AWARDED. I WOULD SUGGEST THAT IT COULD NOT BE AWARDED
11:14AM 19 UNDER THE FACTS OF THIS CASE, IT WOULD BE ERROR TO AWARD IT AND
11:14AM 20 IF IT'S ERROR TO AWARD IT I DON'T SEE WHY YOUR HONOR WOULD LET
11:15AM 21 THEM ARGUE FOR IT CERTAINLY TO A JURY --

11:15AM 22 THE COURT: IT CERTAINLY APPEARS WITHOUT DISPUTE IN
11:15AM 23 THIS CASE THAT CISCO'S CLI IS ONLY SOME PORTION OF THE ALLEGED
11:15AM 24 INFRINGING PRODUCT AND IT HAS SOME PERCENTAGE VALUE -- I MEAN,
11:15AM 25 IT'S ACTUALLY HARD TO IMAGINE THAT IT COULD BE 100 PERCENT OF

11:15AM 1 THE VALUE. AND DR. CHEVALIER DOESN'T OFFER -- DOES SHE OFFER
11:15AM 2 HER OWN?

11:15AM 3 MR. PAK: NO, SHE DOES NOT, YOUR HONOR.

11:15AM 4 THE COURT: AND SHE DOESN'T NEED TO.

11:15AM 5 MR. SILBERT: SHE HAS AN ADJUSTED APPORTIONMENT. SHE
11:15AM 6 OFFERS AN ALTERNATIVE APPORTIONMENT TO MS. ELSTEN.

11:15AM 7 THE COURT: WHICH IS WHAT PERCENTAGE?

11:15AM 8 MR. SILBERT: I BELIEVE IT'S 12.5 FOR THE TOTAL.

11:15AM 9 MR. PAK: THAT'S ONLY CORRECTING THE MISTAKES IN
11:15AM 10 DR. ELSTEN'S METHODOLOGY WHICH SHE SUGGESTS, BUT WE CAN GET
11:15AM 11 INTO IT MORE, YOUR HONOR, WE DON'T NEED TO EXPLAIN IT RIGHT
11:15AM 12 NOW.

11:16AM 13 THE COURT: OKAY. SO YOU ARE ASKING THAT I EXCLUDE
11:16AM 14 DR. CHEVALIER'S OPINION ON NO APPORTIONMENT AND THEN THERE
11:16AM 15 WAS --

11:16AM 16 MR. SILBERT: LOST PROFITS SCENARIO 3, AND WHAT I
11:16AM 17 WOULD LIKE TO ASK THE COURT TO DO IS THINK BACK TO EARLIER THIS
11:16AM 18 MORNING IN YOUR HONOR'S DISCUSSION OF THE MARKET HARM OPINIONS
11:16AM 19 BY MR. SEIFERT. AND THINK OF THESE TWO THINGS AS BEING
11:16AM 20 ANALOGOUS WHEN YOUR HONOR EVALUATES THEM AND EVALUATES THE
11:16AM 21 TESTIMONY.

11:16AM 22 IN THE CONTEXT OF THERE SEIFERT'S OPINION, AND I DON'T HAVE
11:16AM 23 THEM EXACTLY WRITTEN DOWN, YOUR HONOR MADE COMMENTS TO THE
11:16AM 24 EFFECT OF IF A SURVEY OF CUSTOMER IS USING THE STANDARD I WOULD
11:16AM 25 DEMAND IN A PATENT CASE FOR SOMEONE PROVING DAMAGES, NOW LET'S

1 BE CLEAR BY THE WAY WHEN WE ARE TALKING ABOUT LOST PROFITS, WE
2 ARE NOW OUT OF THE EQUITY WORLD, THIS IS ACTUAL DAMAGES WHERE
3 CISCO BEARS THE BURDEN OF PROOF AND THEY'VE GOT TO PROVE ACTUAL
4 LOST PROFITS. IT'S MUCH MORE ANALOGOUS TO A PATENT CASE.

5 AND YOUR HONOR SAID, I WOULD EXPECT A SURVEY WHERE YOU
6 ACTUALLY ASK CUSTOMERS WHAT WAS THE BASIS OF THE DECISION.

7 CISCO, ITSELF, WAS CRITICIZING MR. SEIFERT FOR NOT
8 PERFORMING A SURVEY WHERE HE ACTUALLY ASKED CUSTOMERS WHAT WAS
9 THE BASIS FOR DEMAND AND WHAT WAS DRIVING CUSTOMER DEMAND OR
10 WOULD YOU HAVE BOUGHT THIS IF IT DIDN'T HAVE A CISCO-LIKE CLI,
11 ET CETERA.

12 NOW WHEN WE GET TO DR. CHEVALIER'S OPINIONS, IT'S DIFFERENT
13 FROM CISCO'S PERSPECTIVE. SHE DIDN'T DO ANY SURVEY ON ANY OF
14 HER SCENARIOS.

15 SO IT'S A LITTLE BIT HARD TO UNDERSTAND HOW THEY ARE GOING
16 TO CRITICIZE MR. SEIFERT FOR THAT. BUT EVEN ON SCENARIOS 1 AND
17 2 WHERE SHE DID SOMETHING VERY SIMILAR TO WHAT MR. SEIFERT DID,
18 WHICH IS LOOK AT A BUNCH OF DATA, MARKETING DATA, ET CETERA AND
19 DRAW A CONCLUSION, WE HAVEN'T MOVED TO EXCLUDE THOSE. SHE
20 DIDN'T DO A SURVEY. WE HAVEN'T MOVE TO EXCLUDE THOSE. WE DO
21 NOT MOVE TO EXCLUDE THEM AND WE DON'T THINK THEY ARE GOOD OR
22 ACCURATE.

23 BUT WE DIDN'T MOVE TO EXCLUDE THEM BECAUSE WHAT SHE DID IN
24 SCENARIOS 1 AND 2, LIKE MR. SEIFERT, SHE LOOKED AT THE RECORD,
25 SHE LOOKED AT COMMUNICATIONS WITH CUSTOMERS, SHE LOOKED AT

11:18AM 1 MARKET DATA AND SALES ANALYSIS, AND SHE CONCLUDED PURPORTING TO
11:18AM 2 APPLY SOME EXPERTISE, SHE'S A PROFESSOR OF FINANCE AND
11:18AM 3 ECONOMICS, AND SHE SAID, IN MY OPINION, I'VE IDENTIFIED THESE
11:18AM 4 SALES THAT I THINK YOU WOULDN'T HAVE MADE IF YOU DIDN'T HAVE A
11:18AM 5 CISCO-LIKE CLI.

11:18AM 6 AGAIN, WE DON'T THINK SHE'S RIGHT, BUT WE HAVEN'T MOVED TO
11:18AM 7 EXCLUDE THEM.

11:18AM 8 SCENARIO 3, LETS BE CLEAR, IS NOTHING LIKE THAT. IT -- NOT
11:18AM 9 ONLY DOES IT NOT HAVE A SURVEY, IT DOES NOT INVOLVE ANY
11:18AM 10 APPLICATION OF PURPORTED EXPERTISE.

11:18AM 11 SO IN SCENARIO 3 SHE SAYS, I'M GOING TO CONCLUDE THAT, IN
11:19AM 12 MY SCENARIO 3 I'M GOING TO SAY ARISTA WOULD HAVE BEEN UNABLE TO
11:19AM 13 MAKE "SUBSTANTIALLY ALL OF ARISTA'S SWITCH SALES."

11:19AM 14 SO THE NUMBER, UNSURPRISINGLY, THAT SHE COMES OUT TO ON
11:19AM 15 SCENARIO 3, MUCH, MUCH BIGGER THAN SCENARIOS 1 AND 2 BECAUSE
11:19AM 16 SHE'S INCLUDING THOUSAND OF CUSTOMERS, OVER A BILLION DOLLARS
11:19AM 17 OF REVENUE, THAT'S THE BASIS OF IT, AND WHAT IS HER SUPPORT AS
11:19AM 18 A PURPORTED EXPORT FOR SAYING, I'M GOING TO OPINE TO THE JURY
11:19AM 19 IN THIS SCENARIO 3 THAT ARISTA WOULD HAVE BEEN UNABLE TO MAKE
11:19AM 20 ESSENTIALLY ALL OF ARISTA'S SWITCH SALES? IT'S THAT ARISTA
11:19AM 21 WITNESSES SAID SO. THAT'S WHAT SHE SAYS.

11:19AM 22 THERE'S A FEW SNIPPETS OF TESTIMONY THAT SHE CITES OF A FEW
11:19AM 23 ARISTA WITNESSES WHERE, WELL, MR. SO-AND-SO SAID ON HIS
11:19AM 24 DEPOSITION AT SUCH AND SUCH DATE THAT THEY WOULD HAVE HAD A
11:19AM 25 HARD TIME TELL SELLING SWITCHES IF THEY DIDN'T HAVE -- SO I'M

11:19AM 1 GOING TO ASSUME THEY ARE RIGHT. I'M GOING TO ASSUME IT'S TRUE
11:19AM 2 FOR ALL TIMES, I'M GOING TO ASSUME IT'S TRUE FOR EVERY
11:20AM 3 CUSTOMER.

11:20AM 4 NOW THERE ARE MANY, MANY PROBLEMS WITH THOSE SNIPPETS OF
11:20AM 5 TESTIMONY. THEY ARE EXPLICITLY GENERALLY TALKING ABOUT A
11:20AM 6 PARTICULAR TIME PERIOD WHICH IS OUTSIDE THE STATUTE OF
11:20AM 7 LIMITATIONS, NOT TODAY. THERE'S CLARIFICATION BY THOSE
11:20AM 8 WITNESSES THAT THEY ARE TALKING ABOUT PARTICULAR TYPES OF
11:20AM 9 CUSTOMERS THERE AND THAT OTHER TYPES OF CUSTOMER, THOSE
11:20AM 10 STATEMENT DON'T APPLY TO, ET CETERA.

11:20AM 11 BUT THE LARGER ISSUE HERE IS EXACTLY WHAT YOUR HONOR WAS
11:20AM 12 ALLUDING TO AND WHAT MR. PAK OR MR. NELSON I BELIEVE WAS
11:20AM 13 ALLUDING TO ABOUT THE PROBLEM OF HAVING AN EXPERT WHO HAS THIS
11:20AM 14 MANTEL OF AUTHORITY TALK TO A JURY AND SIMPLY ESPOUSE OPINIONS
11:20AM 15 THAT ARE NOT REALLY EXPERT OPINIONS AT ALL BECAUSE THEY HAVE A
11:20AM 16 GREATER SWAY WITH THE JURY AND THEY SEEM TO HAVE MORE
11:20AM 17 IMPORTANCE.

11:20AM 18 FOR HER TO SAY THIS ARISTA WITNESS SAID THAT THERE WOULD
11:20AM 19 BE -- THEY WOULDN'T HAVE BEEN ABLE TO SELL WITHOUT A CISCO-LIKE
11:21AM 20 CLI. SO I'M GOING TO ADOPT THAT AS MY OPINION AND I'M A
11:21AM 21 PROFESSOR FROM YALE, AND MAYBE THAT WILL COUNT AGAINST HER, BUT
11:21AM 22 WE DON'T KNOW HOW THE JURY WILL REACT, BUT I'M A PROFESSOR FROM
11:21AM 23 YALE AND MY OPINION IS THAT ARISTA COULD NOT HAVE MADE
11:21AM 24 SUBSTANTIALLY ANY OF ITS SALES WITHOUT A CISCO-LIKE CLI.

11:21AM 25 THAT TESTIMONY CAN BE VERY WEIGHTY TO THE JURY. IT COULD

1 HAVE A SIGNIFICANCE COMING FROM HER MOUTH THAT IT WOULDN'T HAVE
2 IF IT SIMPLY CAME INTO EVIDENCE.

3 IT'S NOT -- THE EVIDENCE ISN'T ANYTHING THE JURY NEEDS HELP
4 TO UNDERSTAND. IF THE WITNESS SAYS THAT THE JURY CAN HEAR THE
5 WITNESS SAY THAT. THEY CAN PUT ON THE STATEMENTS OF THE
6 WITNESSES THEY ARE TALKING ABOUT.

7 BUT WHAT WE BELIEVE THEY FUNDAMENTALLY CAN'T DO IS HAVE
8 THIS EXPERT PRESENT THAT AS ONE OF HER EXPERT OPINIONS BASED
9 SIMPLY ON THEY SAID SO.

10 THERE'S A LOT OF CASE LAW CITED IN OUR BRIEF, AND JUST WE
11 REVIEW SOME OF IT HERE. UNDER RULE 702, EXPERT TESTIMONY IS
12 HELPFUL TO THE JURY IF IT CONCERNS MATTERS BEYOND THE COMMON
13 KNOWLEDGE OF THE AVERAGE LAYPERSON AND IS NOT MISLEADING.

14 JUDGE HENDERSON SAYS BELOW, IT IS CERTAINLY TRUE THAT
15 EXPERT TESTIMONY THAT SIMPLY REHASHES OTHERWISE ADMISSIBLE
16 EVIDENCE ABOUT WHICH THE EXPERT HAS NO PERSONAL KNOWLEDGE IS
17 INADMISSIBLE.

18 AND THERE'S MORE CASE LAW AS WELL. SO AGAIN, WE DON'T
19 THINK SCENARIOS 1 AND 2 ARE VALID OR ACCURATE OR THEY CERTAINLY
20 DON'T RISE TO THE LEVEL OF THE SURVEY OR THE OTHER TYPE OF
21 INFORMATION THAT YOUR HONOR SAID YOU WOULD NORMALLY EXPECT, BUT
22 SCENARIO 3 IS IN A WHOLE OTHER CATEGORY ENTIRELY, AND IT'S OUR
23 OPINION, BEYOND THE CASE.

24 THE COURT: OKAY.

25 MR. PAK?

11:22AM 1 MR. PAK: I WILL BE BRIEF, YOUR HONOR.

11:22AM 2 THE COURT: I APPRECIATE THAT.

11:22AM 3 MR. PAK: OKAY. ONE CASE. STATE INDUSTRIES V. MOR
11:22AM 4 FLO. WE AGREE WHEN WE ARE LOOKING AT LOST PROFITS ANALYSIS AND
11:22AM 5 WE ARE LOOKING AT DAUBERT ISSUES, WE SHOULD BE DRAWING
11:22AM 6 ANALOGIES TO PATENT LAW.

11:22AM 7 THERE'S WELL ESTABLISHED PATENT LAW THAT DEALS WITH LOST
11:23AM 8 PROFITS, ACCEPTABLE METHODOLOGIES. ONE OF THE BLACK LETTER
11:23AM 9 METHODOLOGIES THAT AN EXPERT CAN USE TO SHOW LOST PROFITS IS
11:23AM 10 MOR FLO. MOR FLO IS A MARKET SHARE ANALYSIS, YOUR HONOR.

11:23AM 11 SO YOU TAKE AN ECONOMIST LIKE DR. CHEVALIER WHO LOOKS AT
11:23AM 12 RELATIVE MARKET SHARE, MAKES ADJUSTMENTS BASED ON THE RECORD
11:23AM 13 EVIDENCE, BASED ON HER PROFESSIONAL JUDGMENT AS TO HOW TO
11:23AM 14 ALLOCATE. BECAUSE THE QUESTION IS BUT FOR ARISTA'S INFRINGING
11:23AM 15 SALES, WHERE WOULD THOSE SALES HAVE GONE?

11:23AM 16 THE COURT: YEAH.

11:23AM 17 MR. PAK: AND YOU COULD DO IT EITHER ON AN
11:23AM 18 INDIVIDUALIZED CUSTOMER BASIS WHEN YOU HAVE A LARGE MARKET THAT
11:23AM 19 IS WELL STUDIED, AND WE HAVE TWO EXPERT FIRMS NOT CONNECTED TO
11:23AM 20 THIS CASE THAT HAVE DONE MARKET SHARE ANALYSIS, AND EVERY
11:23AM 21 WITNESS IN THIS CASE HAS SAID IS RELIABLE DATA, TO LOOK AT HOW
11:23AM 22 THE MARKET SHARE LOOKS IN THE SPECIFIC MARKETS THAT ARISTA AND
11:23AM 23 CISCO COMPETES IN, IT IS ABSOLUTELY BLACK LETTER LAW FOR HER TO
11:23AM 24 BE ABLE TO SAY AS AN EXPERT, MAKING ADJUSTMENTS FOR THE RECORD,
11:23AM 25 WHICH SHE DID IN THIS CASE, THAT X PERCENTAGE OF SALES THAT

1 WOULD HAVE GONE TO ARISTA BUT FOR THE INFRINGING PRODUCT, AND
2 EVERY ONE OF THESE EOS PRODUCTS HAS THE CLI WE ARE TALKING
3 ABOUT IN THIS CASE.

4 THE COURT: YEAH.

5 MR. PAK: AND THERE'S NO -- AND CONTRARY TO THE
6 CHARACTERIZATIONS, IT'S NOT JUST ANY WITNESS, YOUR HONOR, THE
7 PEOPLE I ASKED WERE THE CEO OF ARISTA, I ASKED THE SAME
8 QUESTIONS OF THE SENIOR VICE PRESIDENT OF CUSTOMER ENGINEERING
9 WHO WAS A 30(B)(6) DESIGNATED WITNESS. I ASKED THE SAME
10 QUESTIONS OF MR. SWEENEY WHO IS THEIR VICE PRESIDENT OF
11 SOFTWARE DEVELOPMENT. THEY ALL GAVE THE SAME RESPONSE. CLI --
12 CISCO-LIKE CLI WAS A BARRIER TO ENTRY FOR US.

13 THEY CANNOT ESTIMATE FOR ME HOW MANY CUSTOMERS THEY WOULD
14 HAVE GAINED OR LOST HAD THEY NOT HAD A CISCO-LIKE CLI. IN
15 FACT, THIS WHOLE DE FACTO INDUSTRY STANDARD ARGUMENT WHICH THEY
16 PRESENTED TO YOU AND THEY PRESSED IN THE EARLY PART OF THE CASE
17 WAS ALL PREDICATED ON THIS IDEA THAT WITHOUT HAVING A
18 CISCO-LIKE CLI, THEY COULDN'T EVEN ENTER THE MARKET.

19 WE KNOW THAT'S NOT TRUE BECAUSE OTHER COMPANIES LIKE
20 JUNIPER MADE DIFFERENT CHOICES.

21 BUT THEIR MARKET STRATEGY WAS GO AFTER CISCO CUSTOMERS,
22 COMPETE WITH SWITCHES THAT LOOK LIKE CISCO SWITCHES.

23 THERE'S NO EVIDENCE, AND JUST GOING TO BACK TO
24 MR. SEIFERT'S ARGUMENTS -- SILBERT'S ARGUMENTS ABOUT
25 DR. ELSTEN, NONE OF THOSE DOCUMENTS GO TO THE ISSUE OF THE

11:25AM 1 DECISIONMAKING PROCESS WITHIN CUSTOMERS.

11:25AM 2 THERE'S NO RECORD EVIDENCE AS TO HOW CUSTOMERS VALUE THESE
11:25AM 3 FEATURES WHEN THEY MAKE THE DECISION TO BUY ARISTA PRODUCTS
11:25AM 4 VERSUS OTHER PRODUCTS.

11:25AM 5 AND SO WHEN WE LOOK AT THIS QUESTION OF WHAT IS THE
11:25AM 6 EVIDENCE ON THE RECORD ABOUT CLI DEMAND DRIVING CONSUMER
11:25AM 7 DEMAND, THE RECORD EVIDENCE IS THE ONE THAT I'VE BEEN ABLE TO
11:25AM 8 ASCERTAIN FROM THEIR 30(B)(6) WITNESS, THEIR TOP EXECUTIVES AS
11:25AM 9 TO ARISTA'S MARKET STRATEGIES, HIGHLY RELEVANT.

11:26AM 10 BUT MORE IMPORTANTLY, YOUR HONOR, THE LAW DOES NOT REQUIRE
11:26AM 11 US TO DO AN INDIVIDUALIZED CUSTOMER ANALYSIS, IT DOESN'T
11:26AM 12 REQUIRE US TO DO MARKET SURVEYS WHEN WE ARE RELYING ON WELL
11:26AM 13 ESTABLISHED METHODOLOGIES SUCH AS MARKET SHARE ANALYSIS.

11:26AM 14 AND THIS IS THE SCENARIO 3 THAT DR. CHEVALIER DID FOR LOST
11:26AM 15 PROFITS.

11:26AM 16 THE COURT: SO THE MARKET SHARE ANALYSIS IS IN
11:26AM 17 ADDITION TO THE ARISTA STATEMENTS?

11:26AM 18 MR. PAK: THAT'S RIGHT, YOUR HONOR.

11:26AM 19 SO WHAT WE HAVE -- THIS IS NOT JUST SIMPLY VOUCHING THE
11:26AM 20 TESTIMONY OF ARISTA, SHE THEN TAKES MARKET DATA THAT SHE'S
11:26AM 21 WELL-TRAINED TO ANALYZE. SHE TAKES THE -- SHE MAKES
11:26AM 22 CORRECTIONS AND ADJUSTMENTS GIVEN THE FACTUAL RECORD, AND
11:26AM 23 SPECIFICALLY, SHE ALLOWS FOR THE POSSIBILITY THAT 20 PERCENT OF
11:26AM 24 THE CUSTOMERS MAY PREFER LINUX RATHER THAN CLI, BASED ON THE
11:26AM 25 TESTIMONY OF ONE OF THEIR CHIEF EXECUTIVES, MAKES CORRECTIONS,

11:26AM 1 THEN PROVIDES THE MARKET SHARE ANALYSIS.

11:26AM 2 THIS IS BLACK LETTER LAW. AND THIS IS SHELDON V. MGM,
11:26AM 3 ANOTHER CASE THAT ADOPTS APPORTIONMENT FROM PATENT LAW TO
11:26AM 4 COPYRIGHT CASES. WE HAVE JARVIS V. K2, ACTUAL DAMAGES
11:27AM 5 CALCULATED AS TO WHAT A WILLING BUYER WOULD HAVE PAID A WILLING
11:27AM 6 SELLER. AND ALSO ADOPTING THIS LOST PROFITS MARKET SHARE
11:27AM 7 ANALYSIS.

11:27AM 8 SO IT'S A QUESTION TO THE EXTENT THAT THEY HAVE, THEY THINK
11:27AM 9 CONFLICTING TESTIMONY FROM THEIR OWN WITNESSES ABOUT THE
11:27AM 10 IMPORTANCE OF CLI AT DIFFERENT TIME PERIODS. THAT'S TYPICAL
11:27AM 11 MATERIAL FOR CROSS-EXAMINATION AND DIRECT EXAMINATION AT TRIAL.

11:27AM 12 BUT IN TERMS OF METHODOLOGY, YOUR HONOR, THAT CASE IS NOT
11:27AM 13 CONTESTED IT ESTABLISHES MARKET SHARE ANALYSIS.

11:27AM 14 MR. SILBERT: MAY I HAVE 60 SECONDS ON MARKET SHARE?

11:27AM 15 THE COURT: SURE.

11:27AM 16 MR. SILBERT: AS YOUR HONOR KNOWS, THERE ARE THREE
11:27AM 17 STEPS IN A LOST PROFITS ANALYSIS.

11:27AM 18 STEP 1 IS YOU WOULD NOT HAVE MADE THIS SALE, YOU THE
11:27AM 19 DEFENDANT, BUT FOR YOUR INFRINGEMENT. THAT'S THE FIRST THING
11:28AM 20 TO PROVE. WHAT SALES WOULD YOU NOT HAVE MADE HAD YOU NOT
11:28AM 21 INFRINGED.

11:28AM 22 THE SECOND STEP IS, IF YOU, THE DEFENDANT, HAD NOT MADE
11:28AM 23 THAT SALE, WE, THE PLAINTIFF, WOULD HAVE MADE THAT SALE OR SOME
11:28AM 24 PORTION OF THOSE SALES.

11:28AM 25 AND THEN THE THIRD STEP IS, IF WE MADE THOSE SALES, HERE'S

11:28AM 1 HOW MUCH PROFIT WE WOULD HAVE MADE ON THOSE SALES AND NOW YOU
11:28AM 2 HAVE TO GIVE US THAT PROFIT.

11:28AM 3 THE MARKET SHARE ANALYSIS, IT IS APPLIED IN STEP NUMBER 2,
11:28AM 4 THAT MR. PAK WAS TALKING ABOUT. IN OTHER WORDS, AND THEN SHE
11:28AM 5 ALSO APPLIES SOME ACCOUNTING AND MATH IN STEP NUMBER 3.

11:28AM 6 SHE USES THE SAME MARKET SHARE ANALYSIS AND THE SAME MATH
11:28AM 7 IN HER SCENARIOS 1 AND 2. THE PROBLEM WITH HER SCENARIO 3 IS
11:28AM 8 IN STEP 1, BECAUSE WHEREAS IN SCENARIOS 1 AND 2 SHE LOOKS AT A
11:28AM 9 BUNCH OF DATA, PURPORTS AT LEAST TO APPLY SOME EXPERTISE AND
11:28AM 10 SAYS, I'VE IDENTIFIED THESE SALES THAT IN MY EXPERT OPINION I
11:28AM 11 THINK YOU WOULD NOT HAVE MADE, THAT THOSE ARE SCENARIOS 1 AND
11:29AM 12 2.

11:29AM 13 IN SCENARIO 3 SHE DOESN'T. AND THAT'S WHAT THE WHOLE
11:29AM 14 OPINION HINGES ON. SHE STARTS WITH SAYING IN STEP 1 YOU WOULD
11:29AM 15 NOT HAVE MADE SUBSTANTIALLY ALL OF YOUR SWITCH SALES
11:29AM 16 SUBSTANTIALLY ALL, THOSE ARE HER WORDS. AND HOW DO I KNOW
11:29AM 17 THAT? BECAUSE SO-AND-SO SAID SO. THAT'S THE ONLY BASIS, THE
11:29AM 18 ONLY BASIS.

11:29AM 19 AND THAT'S THE PROBLEM. EVERYTHING ELSE IS ANCILLARY TO
11:29AM 20 THAT.

11:29AM 21 THE COURT: SO THE MARKET SHARE ANALYSIS IS ONLY IN
11:29AM 22 STEP 2.

11:29AM 23 MR. SILBERT: IT'S THE TAIL ON THE DOG, TO SAY THE
11:29AM 24 LEAST. EXACTLY.

11:29AM 25 MR. PAK: YOUR HONOR, JUST QUICKLY, THIS IS EXACTLY

11:29AM 1 STATED IN MOR FLO. INSTEAD OF DOING AN INDIVIDUALIZED BUT FOR
11:29AM 2 ANALYSIS, THAT CASE LAW ALLOWS INTELLECTUAL PROPERTY OWNERS TO
11:29AM 3 ESTABLISH ALL THE PRONGS OF LOST PROFITS BY LOOKING AT MARKET
11:29AM 4 SHARE AND MAKING REASONABLE ASSUMPTIONS ABOUT WHAT ARE THE
11:29AM 5 MARKET WILL TELL YOU.

11:29AM 6 THE COURT: I WILL TAKE A LOOK AT THAT.

11:29AM 7 OKAY. WE ARE DOING PRETTY WELL. WE ARE GOING TO MOVE ON
11:29AM 8 THEN TO THE LAST ONE WHICH IS DR. CLARK. AND I DON'T THINK I
11:30AM 9 MADE ANY COMMENTS ABOUT DR. CLARK WHEN I STARTED. DR. CLARK
11:30AM 10 GOT CAUGHT IN THE TIME SCHEDULE HERE, AS DID CISCO'S EXPERT.
11:30AM 11 SO IT'S CERTAINLY --

11:30AM 12 MR. SILBERT: I DON'T WANT TO DENY MR. JAFFE HIS
11:30AM 13 MOMENT IN THE SUN. I THINK WE WOULD BE HAPPY TO SUBMIT IT ON
11:30AM 14 THE PAPERS, AS IT IS A SIMPLE ISSUE.

11:30AM 15 MR. JAFFE: IF YOU HAVE ANY QUESTIONS.

11:30AM 16 THE COURT: LET ME JUST STATE WHAT I THINK I'VE
11:30AM 17 GLEANED AND THEN YOU CAN CORRECT ME. I DON'T WANT YOU TO MISS
11:30AM 18 THE OPPORTUNITY TO SET ME STRAIGHT ON IT.

11:30AM 19 MR. JAFFE: CERTAINLY.

11:30AM 20 THE COURT: CLEARLY, DR. CLARK CAN ONLY TESTIFY
11:30AM 21 OPINIONS THAT ARE CONSISTENT WITH THE COURT'S ACTUAL CLAIMS
11:30AM 22 CONSTRUCTION. SO THAT WILL BE A LIMITATION. I DON'T THINK
11:30AM 23 THAT'S A REMARKABLE STATEMENT HERE.

11:30AM 24 I WOULD ALLOW HIM TO TESTIFY AS TO ANY OPINIONS THAT ARE IN
11:30AM 25 HIS REPORT, AND TO THE EXTENT THAT HE GAVE AN OPINION ON

11:31AM 1 ALTERNATE PROPOSED CONSTRUCTIONS AND GOT IT, AND HAD AN OPINION
11:31AM 2 ON ONE I ADOPTED, THEN HE'S FINE.

11:31AM 3 TO THE EXTENT AT HIS DEPOSITION HE ULTIMATELY GAVE AN
11:31AM 4 OPINION BASED ON THE, MY CLAIMS CONSTRUCTION WHICH WAS ONLY A
11:31AM 5 COUPLE OF DAYS EARLIER, I WOULD ALLOW THAT.

11:31AM 6 AND HERE'S WHERE THE PROBLEM COMES IN, AND MAYBE YOU CAN
11:31AM 7 HELP ME OUT. IT'S ARGUED THAT FOR THE TWO TERMS THAT I CHANGED
11:31AM 8 OR THAT -- I CAN'T REMEMBER HOW THEY WERE CHANGED, BUT FOR
11:31AM 9 THOSE TWO TERMS, TO THE EXTENT HE WOULD SAY THAT HIS OPINION,
11:31AM 10 ALTHOUGH NOT INCORPORATING EXPRESSLY MY CLAIMS CONSTRUCTION, IS
11:31AM 11 NOT AFFECTED MATERIALLY BY THE DIFFERENCE. THAT'S WHERE THE
11:31AM 12 ISSUE IS HERE.

11:31AM 13 I ACTUALLY WOULD ALLOW HIM, I'M INCLINED TO ALLOW HIM TO
11:31AM 14 TESTIFY AND EXPLAIN WHY HIS OPINION, ALTHOUGH NOT EXPRESSLY
11:32AM 15 INCORPORATING MY CONSTRUCTION, IS CONSISTENT WITH MY
11:32AM 16 CONSTRUCTION. AND HE WILL HAVE TO TALK HIMSELF OUT INTO THAT.
11:32AM 17 BUT THAT'S WHAT I WOULD LET HIM DO.

11:32AM 18 SO TELL ME WHY I SHOULD NOT, OR MAYBE YOU HAVE NO OBJECTION
11:32AM 19 TO THAT.

11:32AM 20 MR. JAFFE: SO I THINK THERE'S TWO POINTS.

11:32AM 21 FIRST, ON THE FIRST ISSUE WHICH IS FOR THE CONSTRUCTIONS
11:32AM 22 THAT THE COURT ADOPTED THAT WERE NOT PROPOSED BY EITHER PARTY,
11:32AM 23 DR. CLARK ADMITTED IN HIS DEPOSITION THAT THAT DOES AFFECT HIS
11:32AM 24 OPINIONS.

11:32AM 25 THE COURT: OKAY, YEAH.

11:32AM 1 MR. JAFFE: AND SO THE ULTIMATE CONCLUSION THAT HE
11:32AM 2 REACHES AS TO WHETHER SOMETHING IS OBVIOUS OR WHETHER SOMETHING
11:32AM 3 IS ANTICIPATED, IS THEREFORE FAULTY AS A GENERALLY MATTER. SO
11:32AM 4 HE DOESN'T HAVE ANY OPINIONS ON THE ULTIMATE ISSUES AS TO
11:32AM 5 ANTICIPATION OR OBVIOUSNESS THAT APPLY THE COURT'S
11:32AM 6 CONSTRUCTION.

11:32AM 7 SO IT'S NOT THE CASE THAT WE COULD LOOK AT HIS REPORT AND
11:32AM 8 PUZZLE TOGETHER THE OPINIONS THAT HE WOULD HAVE HAD.

11:32AM 9 THE COURT: THAT'S YOUR VIEW, AND OF COURSE
11:32AM 10 MR. SILBERT, IS THIS YOUR BAILIWICK AS WELL?

11:33AM 11 I WILL HEAR FROM HIM AS TO WHETHER IN THE DEPOSITION
11:33AM 12 DR. CLARK ACTUALLY SAID WELL, EVEN THOUGH I DIDN'T APPLY THAT
11:33AM 13 CONSTRUCTION, IT DOESN'T CHANGE MY OPINION. I THINK THAT MAY
11:33AM 14 BE WHERE WE ARE.

11:33AM 15 SO YOU DON'T OBJECT, OBVIOUSLY THIS IS ONLY ABOUT THE TWO
11:33AM 16 INSTANCES WHERE THE PARTIES DIDN'T KNOW WHICH WAY I WAS GOING
11:33AM 17 AND, BECAUSE I DIDN'T PICK YOUR SUGGESTIONS.

11:33AM 18 MR. JAFFE: IT MIGHT BE HELPFUL TO GIVE AN EXAMPLE.

11:33AM 19 SO I PULLED UP SLIDE 5 HERE.

11:33AM 20 THE COURT: OKAY.

11:33AM 21 MR. JAFFE: AND SO THIS IS DURING DR. CLARK'S
11:33AM 22 DEPOSITION. AND I READ TO HIM YOUR REPORT AND I SAID, IS THIS
11:33AM 23 YOUR OPINION? AND HE SAYS NO, IT'S NOT MY OPINION ANYMORE.

11:33AM 24 THE COURT: OKAY.

11:33AM 25 MR. JAFFE: SO IT WASN'T THE CASE WHERE HIS OPINION

11:33AM 1 STILL HOLDS.

11:33AM 2 THE COURT: ALL RIGHT.

11:33AM 3 MR. JAFFE: BUT IT'S -- INSTEAD, THE OPINION IS
11:33AM 4 FAULTY.

11:33AM 5 AND THE OTHER THING I WANTED TO ADD IN ADDITION, IS EVEN
11:33AM 6 UNDER THE COURT'S CONSTRUCTION, DR. CLARK DID A NEW OPINION
11:33AM 7 THAT WE DON'T THINK IS ADMISSIBLE, BUT TO THE EXTENT THE COURT
11:34AM 8 IS WILLING TO HEAR IT, THE NEW OPINION SAYS EVEN READING THE
11:34AM 9 COURT'S CLAIM CONSTRUCTION, I STILL DON'T HAVE ANY OPINIONS.

11:34AM 10 UNDER HIS VIEW OF THE CLAIM CONSTRUCTION ORDER, THERE IS NO
11:34AM 11 INVALIDITY OPINIONS TO OFFER. SO THIS IS EVEN --

11:34AM 12 THE COURT: BUT HE'S LOCKED INTO HIS TESTIMONY.

11:34AM 13 MR. JAFFE: THAT'S RIGHT.

11:34AM 14 THE COURT: I DON'T HAVE A PROBLEM WITH THAT. IF HE
11:34AM 15 SAYS I DON'T HAVE AN OPINION THEN HE CAN'T OFFER ONE AT TRIAL.

11:34AM 16 MR. JAFFE: RIGHT.

11:34AM 17 SO WE ARE MOVING, BECAUSE HIS ULTIMATE CONCLUSION, IF HE
11:34AM 18 WERE TO GET UP ON THE WITNESS STAND AND SAY, I THINK THIS IS
11:34AM 19 ANTICIPATED, I THINK THIS IS RENDERED OBVIOUS, THAT CONCLUSION
11:34AM 20 WOULD BE A FAULTY CONCLUSION TO OFFER BECAUSE THE ONLY
11:34AM 21 TESTIMONY THAT'S BEEN DISCLOSED, THE ONLY OPINIONS THAT HAVE
11:34AM 22 BEEN DISCLOSED ARE UNDER THE WRONG CONSTRUCTIONS.

11:34AM 23 SO IF HE WOULD GET UP AND TESTIFY AS TO THE ULTIMATE
11:34AM 24 CONCLUSIONS ON VALIDITY, THAT WOULD BE INADMISSIBLE UNDER 702.

11:34AM 25 THE COURT: SO I THINK MAYBE -- I DO UNDERSTAND WHAT

11:34AM 1 YOU ARE SAYING. HE MAY NOT TESTIFY AS TO OPINIONS NOT OFFERED
11:35AM 2 IN HIS REPORT OR HIS DEPOSITION.

11:35AM 3 SO HERE WHERE YOU ARE SHOWING ME HE SAID I HAVE NO OPINION,
11:35AM 4 I WOULD NOT ALLOW HIM TO COME IN AT TRIAL WITH AN OPINION. SO
11:35AM 5 THAT'S PRETTY BASIC THOUGH.

11:35AM 6 I MEAN, THAT'S -- AND YOU OF COURSE, SHOULD HE GO INTO THAT
11:35AM 7 AREA, YOU WOULD OBJECT, YOU WOULD SHOW ME HIS DEPOSITION
11:35AM 8 TESTIMONY. IT'S, YOU KNOW, I NEVER CAN HAVE FULL COMMAND OF
11:35AM 9 THE EXPERT REPORT SO THIS IS TYPICAL. THAT'S NOT A
11:35AM 10 PARTICULARLY DIFFICULT RULING TO MAKE.

11:35AM 11 THEN WE WILL SEE WHAT HE'S ACTUALLY ASKED TO OPINE ON
11:35AM 12 BECAUSE I CAN'T FORECLOSE A PARTICULAR QUESTION, I DON'T KNOW
11:35AM 13 WHAT IT WILL BE. AND YOU WILL JUST HAVE TO BE -- I CAN GIVE A
11:35AM 14 HIGH LEVEL RULING HERE THAT HE'S LIMITED TO THE OPINIONS HE'S
11:35AM 15 OFFERED IN HIS REPORTS AND IN HIS DEPOSITION AND NO MORE.

11:35AM 16 MR. JAFFE: WELL, I THINK IF I CAN BACK UP --

11:35AM 17 THE COURT: SO YOU WANT A LITTLE MORE PROTECTION.

11:35AM 18 MR. JAFFE: I AGREE WITH EVERYTHING YOUR HONOR JUST
11:35AM 19 SAID.

11:35AM 20 BUT I THINK IF YOU BACK UP AND LOOK AT THE LEGAL STANDARD
11:36AM 21 WE ARE LOOKING AT HERE FROM A DAUBERT PERSPECTIVE, WHICH IS
11:36AM 22 TESTIMONY FROM A TECHNICAL EXPERT THAT'S BASED ON THE WRONG
11:36AM 23 CONSTRUCTION, IS NOT RELEVANT AND SHOULD BE EXCLUDED.

11:36AM 24 SO WE AGREE FROM A DISCLOSURE POINT OF VIEW THAT THERE ARE
11:36AM 25 NO OPINIONS, BUT ADDITIONALLY UNDER 702 THESE OPINIONS ARE NOT

11:36AM 1 RELEVANT BUT THEY ARE ALSO NOT RELIABLE OR HELPFUL TO THE JURY
11:36AM 2 BECAUSE THEY ARE BASED ON THE WRONG CONSTRUCTIONS.

11:36AM 3 THE COURT: OKAY. AND I THINK THAT'S A FAIR
11:36AM 4 STATEMENT OF THE LAW.

11:36AM 5 I DON'T THINK -- I WOULD BE SURPRISED IF ARISTA WAS GOING
11:36AM 6 TO OFFER AN OPINION BASED ON A CONSTRUCTION I DIDN'T ADOPT.

11:36AM 7 MR. JAFFE: SO I THINK THE SUM TOTAL IS THERE'S
11:36AM 8 NOTHING LEFT FOR DR. CLARK --

11:36AM 9 THE COURT: THAT'S NOT FOR ME TO SAY.

11:36AM 10 I MEAN, THAT'S TOO BIG FOR ME TO RULE THAT HE CAN'T TESTIFY
11:36AM 11 AT ALL. I NEED TO MAKE THESE RULINGS MORE NARROWLY FOCUSED, AS
11:36AM 12 WAS YOUR MOTION.

11:36AM 13 MR. JAFFE: ABSOLUTELY.

11:36AM 14 THE COURT: THE RESULT MAY BE WHAT YOU ARE SUGGESTING
11:36AM 15 IS THERE'S NOTHING MORE FOR HIM TO SAY, BUT I'M NOT GOING TO
11:36AM 16 PARSE THROUGH HIS ENTIRE REPORT TO MAKE THAT DETERMINATION.

11:37AM 17 MR. JAFFE: FAIR ENOUGH.

11:37AM 18 AND THEN AS TO THE LAST POINT WHICH IS HIS OWN OPINION HERE
11:37AM 19 ON SLIDE 6, IS THAT EVEN READING THE CLAIM CONSTRUCTION ORDER,
11:37AM 20 HE DOESN'T HAVE ANY NEW VALIDITY OPINIONS TO OFFER.

11:37AM 21 SO THAT'S KIND OF WHERE WE ARE LEFT IN TERMS OF WHAT DOES
11:37AM 22 HE HAVE TO OFFER THE JURY THAT'S RELEVANT.

11:37AM 23 BUT UNLESS YOU HAVE ANYTHING FURTHER.

11:37AM 24 THE COURT: MR. SILBERT, LET'S SEE WHAT AREA OF
11:37AM 25 DISAGREEMENT WE HAVE HERE.

11:37AM 1 MR. SILBERT: I DON'T THINK WE DISAGREE AT ALL WITH
11:37AM 2 WHAT YOUR HONOR SAID, AND I THINK WE ARE FINE WITH THE TYPE OF
11:37AM 3 RULING THAT YOUR HONOR ARTICULATED.

11:37AM 4 JUST TO CLARIFY, WHAT DR. CLARK SAID WAS, NOW READING THE
11:37AM 5 COURT'S CLAIM CONSTRUCTION, THERE ARE WAYS IN WHICH I DON'T
11:37AM 6 THINK THAT THE PRIOR ART ACTUALLY PRACTICES THE CLAIM, BUT IT
11:37AM 7 IS HIS OPINION THAT THE PRIOR ART WORKS THE SAME WAY THAT
11:37AM 8 ARISTA'S PRODUCT DOES.

11:37AM 9 SO WHAT HE SAYS IS, THE WAY THAT I WOULD READ THIS
11:37AM 10 CONSTRUCTION, I DON'T THINK IT WOULD READ ON THIS, BUT I AM
11:38AM 11 OPINING THAT THIS, IN THE PRIOR ART, IS THE SAME AS WHAT
11:38AM 12 ARISTA'S PRODUCT DOES.

11:38AM 13 SO IF SOMEBODY DISAGREED WITH ME, THEN THEY MIGHT DISAGREE
11:38AM 14 WITH ME. BUT THOSE ARE HIS OPINIONS.

11:38AM 15 THE COURT: SO I'M A LITTLE LOST. I'M JUST TRYING TO
11:38AM 16 UNDERSTAND.

11:38AM 17 THE ARISTA'S PRODUCT PRACTICES THE PRIOR ART, BUT HE HAS NO
11:38AM 18 OPINION AS TO WHETHER THE PRIOR ART INVALIDATES THE '526
11:38AM 19 PATENT; IS THAT CORRECT?

11:38AM 20 MR. SILBERT: WHAT HE SAYS IS, IN CERTAIN RESPECTS,
11:38AM 21 IF ARISTA'S PRODUCT DOES, IF THIS WERE CONSIDERED TO BE
11:38AM 22 PRACTICING THIS LIMITATION, THEN IT'S CLEARLY DISCLOSED IN THE
11:38AM 23 PRIOR ART. THAT'S WHAT HE SAYS.

11:38AM 24 MR. JAFFE: YOUR HONOR, IF I MAY ADDRESS THAT FOR A
11:38AM 25 MOMENT --

11:38AM 1 THE COURT: THAT MAKES MY HEAD HURT A LITTLE BECAUSE
11:38AM 2 HE'S BASICALLY SAYING IF THE JURY FINDS INFRINGEMENT THEN IT'S
11:38AM 3 OBVIOUS -- I'M NOT SURE WHERE THAT -- I'M NOT SURE I UNDERSTAND
11:39AM 4 THAT.

11:39AM 5 MR. SILBERT: THAT'S ONLY WITH RESPECT TO I THINK ONE
11:39AM 6 LIMITATION. HE HAS LOTS OF OTHER OPINIONS ABOUT THE OTHERS.

11:39AM 7 THE COURT: SURE, SURE.

11:39AM 8 MR. SILBERT: I THINK THE SUM TOTAL OF IT IS WE DON'T
11:39AM 9 DISAGREE WITH ANYTHING YOUR HONOR SAYS.

11:39AM 10 HE'S LIMITED TO WHAT HE SAID, THE OPINIONS HE EXPRESSED IN
11:39AM 11 HIS DEPOSITION.

11:39AM 12 THE COURT: AND HE CAN'T TESTIFY AS TO OPINIONS THAT
11:39AM 13 ARE NOT BASED ON THE COURT'S ACTUAL CONSTRUCTIONS.

11:39AM 14 MR. SILBERT: SURE, NOR WOULD WE ASK HIM TO.

11:39AM 15 THE COURT: I THINK THAT GIVES YOU THE RULING YOU ARE
11:39AM 16 LOOKING FOR.

11:39AM 17 MR. JAFFE: YES, WITH THE CAVEAT THAT IF DR. CLARK
11:39AM 18 SHOWS UP AND SAYS, I HAVE DISCLOSED OPINIONS THAT IT'S INVALID,
11:39AM 19 THOSE AREN'T IN HIS REPORT, BASED ON THE COURT'S CONSTRUCTIONS.

11:39AM 20 THE COURT: AND THAT WOULD NOT -- THAT'S AN
11:39AM 21 UNFORTUNATE PART OF THE TRIAL EXERCISE IS THAT MID-TRIAL YOU
11:39AM 22 ARE SCURRYING THROUGH THE REPORTS AND DEPOSITIONS AND I AM AT
11:39AM 23 YOUR MERCY TO SHOW THEM TO ME.

11:39AM 24 IT'S ONE OF THE MOST DIFFICULT RULINGS THAT I HAVE TO MAKE
11:39AM 25 DURING TRIAL BECAUSE I DON'T HAVE COMMAND OF THE REPORTS AND I

11:40AM 1 COULD NEVER.

11:40AM 2 SO BE FOREWARNED THAT WHEN YOU OFFER DR. CLARK FOR A
11:40AM 3 CERTAIN OPINION, THAT YOU HAVE TO BE READY TO PULL OUT AND SHOW
11:40AM 4 ME THAT IT'S THERE. BECAUSE IF YOU CAN'T SHOW IT TO ME, WE ARE
11:40AM 5 DONE.

11:40AM 6 MR. SILBERT: ABSOLUTELY.

11:40AM 7 THE COURT: AND THAT'S THE WAY IT GOES, THAT'S JUST
11:40AM 8 COMMON.

11:40AM 9 SO I THINK MY RULING WILL BE AT THIS MORE GENERIC LEVEL,
11:40AM 10 AND OF COURSE CISCO WILL HAVE TO BE VIGILANT IN POSING THOSE
11:40AM 11 OBJECTIONS, BUT I CAN'T GET INTO DEEPER AND PARSE EACH LINE OF
11:40AM 12 HIS DEPOSITION TO SAY THIS IS IN AND THIS IS OUT. I DON'T
11:40AM 13 ACTUALLY KNOW WHICH ONES YOU WILL OFFER. SO IT'S JUST NOT WHAT
11:40AM 14 I WOULD DO.

11:40AM 15 SO I THINK, IN A SENSE, CISCO IS GOING TO WIN THIS ONE, BUT
11:40AM 16 IT'S ONLY WINNING A BATTLE AND THE WAR IS STILL TO BE FOUGHT ON
11:40AM 17 SO MANY THINGS.

11:40AM 18 MR. SILBERT: THANK YOU, YOUR HONOR.

11:40AM 19 MR. PAK: THANK YOU, YOUR HONOR.

11:41AM 20 THE COURT: ALL RIGHT. GOOD. THAT WAS PRETTY GOOD.

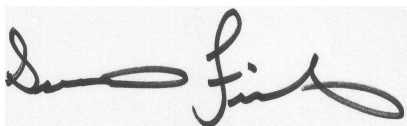
11:41AM 21 HERE'S WHAT I WOULD LIKE TO DO, I THINK WE HAVE COVERED ALL
11:41AM 22 OF THE DAUBERT MOTIONS, AND I WILL THEN -- I THINK WE HAVE
11:41AM 23 WORKED THROUGH A LOT OF IT, SO I'M REALLY FEELING LIKE THIS IS
11:41AM 24 GOING TO MOVE ALONG PRETTY WELL BASED ON THE EXCELLENT WORK
11:41AM 25 THAT YOU'VE DONE TO PRESENT IT TO ME, AND I THANK YOU FOR THAT.

11:41AM 1 I WOULD LIKE TO TAKE JUST A FIVE-MINUTE BREAK AND THEN I
11:41AM 2 WOULD LIKE TO SEE COUNSEL IN CHAMBERS. I JUST WANT TO DO SOME
11:41AM 3 OF THE PLANNING AND HOUSEKEEPING DISCUSSION.
11:41AM 4 I DON'T ACTUALLY WANT IT ON THE RECORD, AND IT WOULD BE
11:41AM 5 ATTORNEYS ONLY. I KNOW YOU MAY HAVE SOME CLIENT
11:41AM 6 REPRESENTATIVES HERE, BUT WE ARE JUST GOING TO TALK ABOUT THE
11:41AM 7 TRIAL PREP ITSELF.
11:41AM 8 SO LET'S TAKE FIVE MINUTES, THEN I WILL SEE YOU IN
11:41AM 9 CHAMBERS.
11:41AM 10 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)
11
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 9/12/16